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THE USURPED POWERS OF THE SENATE

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A century of constitutional government in the United States has served to emphasize the wisdom of Hamilton's warning of "the tendency of the legislative authority to absorb every other." He clearly foresaw and attempted to guard against, dangers that today are only too apparent. "In governments purely republican," he wrote, "this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or the judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and, as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution."[1]

[1] *The Federalist*, No. 70.

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Never did human ingenuity devise a more nicely balanced system of government than when the framers of the Constitution allocated to the executive and to the legislature the exercise of powers not to be infringed by the other; but like many things human the intent has been perverted. Every person familiar with the Constitution, the debates in the convention, and the writings of Madison, Hamilton, and Jay in *The Federalist,* must know that the purpose of the framers of the Constitution was to create a system of government by which the President should become neither the creature nor the controller of the legislature; and by vesting certain exclusive powers in the popular branch and certain other powers in the Senate to provide that the line of demarcation between the two houses should not be overstepped. What they feared, and believed they had effectually guarded against was an executive who would become possessed of autocratic powers; what they dreaded no less was a legislature that would reduce the President merely to a puppet—a puppet to dance when Congress pulled the strings. Monarchial Europe and the Roman republics had warned them of the danger to the liberties of the people when the king was the source of all power, or when, in a republic, that power was usurped by a council or other elected body supposed to safeguard the people against the encroachments of the executive.

In making this exact and definite division of power the framers of the Constitution had a distinct purpose in view. The legislature was to act as a check upon the executive; the restraining influence of one branch of the legislature was to be exercised upon the other. Modeled upon the House of Commons, the House of Representatives was given control over expenditures; and it

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is that control that really constitutes the power of a legislature in a constitutional form of government. The right of the House of Representatives to originate "money bills" led to prolonged discussion in the constitutional convention. There was a marked disposition shown by many of the delegates to make the Senate a negligible quantity, so far as bills raising revenue were concerned, by prohibiting the right of amendment—the functions of the Senate in this respect to be analogous to the House of Lords, which may neither increase nor diminish a revenue bill sent to them by the Commons. But in granting that power to the Senate it is interesting to note (in view of what I believe is foreign to the spirit of the Constitution and the intent of its framers) the exercise of usurped powers by the Senate. In the constitutional convention, Mason, of Virginia, addressing himself to the powers of the two houses relating to revenue bills and the right of the Senate to amend, used this language:

"By authorizing amendments in the Senate it got rid of the objections that the Senate could not correct errors of any sort, and that it would introduce into the House of Representatives the practice of tacking foreign matter to money bills. These objections being removed, the arguments in favor of the proposed restraint on the Senate ought to have full force. The Senate did not represent the *people* but the *States* in their political character. It was improper, therefore, that it should tax the people. . . . . Again, the Senate is not like the House of Representatives chosen frequently and obliged to return frequently among the people. They are to be chosen by the States for six years, will probably settle themselves at the seat of government, will pursue schemes for their own aggrandizement—will be able by wearying out the

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House of Representatives and taking advantage of their impatience at the close of a long session, to extort measures for that purpose. . . . . A bare negative was a very different thing from that of originating bills. The practice of England was in point. The House of Lords does not represent nor tax the people, because not elected by the people. If the Senate can originate, they will in the recess of the legislative sessions, hatch their mischievous projects, for their own purposes, and have their money bills ready cut and dried (to use a common phrase) for the meeting of the House of Representatives."[1]

Here, very concisely, the fundamental question has been stated. The House represented the people; the Senate did not. Taxation was a prerogative to be exercised by the people. The makers of the Constitution feared executive as well as judicial usurpation. They erected barriers to protect themselves. For that reason the treaty making power was divided between the executive and the Senate, and the argument used in support of that division of power was that "a man raised from the station of a private citizen to the rank of chief magistrate—possessed of a moderate or slender fortune, and looking forward to a period not very remote when he may probably be obliged to return to the station from which he was taken—might sometimes be under temptations to sacrifice his duty to his interest, which it would require superlative virtue to withstand." And note again Hamilton's warning against placing too great power in the hands of the President. "The history of human conduct," he says, "does not warrant that exalted opinion of human virtue which would make it wise in a nation to

[1]Documentary History of the Constitution of the United States of America, vol. iii, p. 514.

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commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."[1]

The same distrust of the judiciary was expressed with equal frankness. It was proposed in the constitutional convention that the power to confirm appointments should be vested in the Supreme Court, but the suggestion was negatived, as it was feared that the Supreme Court would be too readily susceptible to the influence of the President, owing to the members of the court being his appointees. That the Senate would attempt to dictate appointments, that it would demand of the President that certain men should be appointed to office or failing this, that other men would not be confirmed, was so repugnant to the spirit of the Constitution that its framers refused to entertain it as a contingency to be guarded against. This interference with the President in the free exercise of the appointing power is another of the usurped powers of the Senate, dangerous to the people, and a curtailment of the rights of the executive.

Entertaining a distrust of the President and the judiciary, it was to the legislature that the framers of the Constitution looked to preserve those rights and liberties for which they had paid with their blood. But here again they saw the danger that might follow from the centralization of power in a small and cohesive body such as the Senate. The example of England and the teachings of history had convinced them that a bicameral legislature was necessary; and although there was pronounced opposition to the creation of a second chamber,

[1] *The Federalist*, No. 75.

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and much fear was expressed that the Senate would oppress the House of Representatives, the argument that "history informs us of no long lived republic which had not a Senate" prevailed, and the restrictions thrown around the Senate were considered strong enough to nullify any danger. It was to the House of Representatives that these men really pinned their faith. Its members were to be elected at short intervals, they came direct from the people, they represented the people, they were of the people. If they committed treason it was treason against themselves. If they were tyrannous they would suffer from their own tyranny. If through weakness or self-interest they bartered their own liberties they would pay the penalty. Surely this was confidence not misplaced. And above all they commanded the exchequer. "They, in a word, hold the purse," Hamilton said of the House. Against this power kings and oligarchs have contended in vain. The purse is more potent than the sword, for it is only when the purse is opened that the sword is unsheathed.

I have thus briefly sketched what my study of the Constitution has taught me was the intent of its framers, and I now propose to show how this intent has been perverted. But before doing so let me summarize the broad principles of the Constitution. It was contemplated that there should be: First, an executive untrammeled by the legislature in the exercise of his constitutional rights. Second, a Senate which should supervise the executive so as to prevent the appointment of improper or unfit persons to public office, or the making of treaties detrimental to national interests; and which should have coördinate powers with those of the House of Representatives except in legislation affecting "money bills." Third, a

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House of Representatives that should have control over the national purse. How far have the American people departed in principle from the scheme of their Fathers?

Perhaps the most important divergence, which is almost the most dangerous to the rights and liberties of the people and to the future of the republic, is the right arrogated by the Senate (which, I regret to say, has been ratified by the Supreme Court) to control the purse, which in its broader sense means not only the right to make appropriations but the higher privilege to impose taxation. The Constitution provides that all bills raising revenue shall originate in the House of Representatives; but the Senate has power to amend these bills. By this power of amendment the Senate has defeated the purpose of the Constitution, which was to retain the taxing power in the hands of the representatives of the people. The tariff, which is the great source of revenue, is no longer the creation of the House. The House passes a tariff bill, which the Senate proceeds to "amend" in accordance with its own views or the special interests represented by particular Senators. Surely when the Senate strikes out of a tariff bill passed by the House everything except the enacting clause, writes in a new bill, and returns it to the House with an ultimatum that the House must either accept the Senate "amendment" or no tariff bill will be passed, it is obvious that that particular bill has originated in the Senate, even though the constitutional form has been observed because its origin can be traced to the House.

When we turn to the consideration of amendments made by the Senate to "money" or, as we now term them, "appropriation" bills, they are so numerous that it is impossible to catalogue them. As a matter of practice

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appropriation bills are, almost invariably, initiated by the House; but the Senate regards the House bill not as a finality but as a "project" (to use the word applied by a Senator to describe a treaty sent to the Senate for ratification). In other words, the bill passed by the House is a scheme expressing the views of the House in regard to the disbursement of the public moneys, but of no more binding force than a recommendation made by the head of a department. It is notorious that the Senate almost invariably increases the appropriations made by the House; it is equally notorious that in any contest between the House and the Senate it is the House that, nine times out of ten, has to yield to the Senate. The reason for this can be easily explained.

The legislative surrender of the House of Representatives to the Senate began with the election of Mr. Reed to the speakership of the Fifty-First Congress. Mr. Reed found himself confronted with a state of affairs that demanded a drastic remedy. The majority, because of the adoption of foolish rules, was at the mercy of the minority. Practically, business could only be transacted by unanimous consent or the test of endurance. The House could be rendered impotent by the opposition offering dilatory motions which, under the rules, must be voted on to the exclusion of legitimate business, or by breaking a quorum. When Mr. Reed came to the chair he had vivid recollections of the bitter contest over the Direct Tax Bill, when for twenty-six consecutive hours members sat behind locked doors while a call of the House was in progress and the Sergeant-at-Arms and his deputies were scouring Washington to bring members under arrest to the bar of the House.

Mr. Reed resolved, very properly, that the majority,

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being responsible for legislation, should have the power to legislate. He framed a code of rules (and parenthetically it is interesting to add that the code framed sixteen years ago is virtually the code of today) that centralized all power in the hands of the Speaker and deprived the "private member" of all power. Mr. Reed aimed at two things: to enable the House to transact business instead of wasting its time in mere idle talk; to check the rising tide of extravagance that threatened to swamp the treasury. When the House had adopted these rules it was within the power of the Speaker to regulate to the fraction of a second the exact time to be allotted to the consideration of any measure; to permit a measure to be considered or to prevent its consideration.

No man entertains higher appreciation for Mr. Reed than I. His lofty ideals, his great reforms, and the courageous example he has set the country entitle him to the profound gratitude of the American people. And yet I am forced reluctantly to admit that Mr. Reed's rules had unfortunate consequences, albeit they were consequences that Mr. Reed could not foresee.

In his desire to prevent time from being frittered away it often happened that even vital measures were disposed of without proper consideration. When the time set for taking a vote arrived the gavel fell, often in the midst of a sentence, and all debate ceased. And because of the Speaker's rigid ideas of economy, members who were unable to secure appropriations induced Senators to offer these bills in the Senate in the form of amendments.

The rules of the Senate are radically different from those of the House. In the Senate there is no limitation of debate. So long as the physical endurance of a Senator lasts so long may he speak; and by an unwritten but

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strictly observed rule the Senator who is weary may defer the conclusion of his speech until such time as he shall have sufficiently recuperated. Like the mysterious East, the Senate cannot be hurried. It is this freedom of debate that makes the individual Senator so all powerful, which is in such marked contrast to the individual Repsentative, who has no individual power. Senators do not scruple about the exercise of this power. The late Senator Quay threatened to defeat a tariff bill unless certain changes were made that he demanded. He came to the Senate with a speech that would have required weeks in its delivery. The Senate was compelled to make peace with Mr. Quay on his own terms. Senator Carter, of Montana, kept $70,000,000 in the treasury by talking a river and harbor bill to death.

Because of this enormous individual senatorial power, business in the Senate nowadays practically can only proceed by unanimous consent, which bluntly stated means that every Senator must be paid his legislative price. (I use the term without any sinister meaning.) No Senator is so foolish as to antagonize a brother Senator, because, at an inconvenient moment, that Senator might use his power. And that is the reason why members of the House secure appropriations by the roundabout way of the Senate instead of directly through the House, and it explains the statement previously made that appropriation bills, as a rule, are increased by the Senate. It is perhaps almost unnecessary to add that Senators are only too glad to be of service to members of the House, as it places members under obligations to them and forces their constituents to realize that the real fountain of power in Washington is the Senator, which strengthens the hold of the Senator upon his State.

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We have seen that the Senate has usurped legislative powers that the Constitution did not originally contemplate it should possess, and by that usurpation the importance and dignity of the House of Representatives has been correspondingly decreased. It no longer controls the purse, but has been forced to share that control with the Senate. We have now to ascertain whether the Senate has in a similar manner encroached upon the prerogatives of the executive.

"Executive usurpation" has been a favorite theme of writers and speakers (especially during the last few years) who, relying upon their rhetoric rather than their facts, have deplored the growing power of the executive and longed for a return to the early days when the President respected the powers vested in the legislature. But, as a matter of fact, if there has been usurpation that of the President is trivial compared to that of the Senate. In the exercise of the two most important functions reposed in the executive—the conduct of foreign relations and the power of appointment—the purpose contemplated by the framers of the Constitution has been so thoroughly perverted by the usurpation of the Senate that the original relation existing between the President and the Senate has been reversed.

In dividing the responsibility for appointments between the President and the Senate—that is, in making the presidential appointment subject to confirmation by the Senate—it was intended to put in the hands of the Senate the power to prevent the President from making an improper appointment; but it was not intended that the Senate should be able to dictate the President's nominees. That possible assumption was scouted as preposterous.

"It will be the office of the President," Hamilton wrote,

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"to *nominate*, and with the advice and consent of the Senate, to *appoint*. There will, of course [mark the words] be no exertion of *choice* on the part of the Senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice of the President. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed; because there might be no positive ground of opposition to him, and they could be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy."[1]

But Hamilton, wise man though he was, could not anticipate a time when "the courtesy of the Senate" would put it in the power of a single Senator to defeat a nomination, nay, even more than that, to coerce a President into nominating a man of whom he did not approve. One has only to recall the contest between Cleveland and the Senate and that between Harrison and the Senate, and to remember that McKinley as well as Roosevelt had to steer a very fine course to avoid shipwreck of their nominations, to become convinced that the Hamiltonian doctrine is archaic, and that that "complacency" to which Hamilton referred instead of being inspired by "the appearances of merit" springs from self-interest.

The relations between the President and the Senate are

[1] *The Federalist*, No. 66

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harmonious so long as the President defers to the Senate and the Senate is willing to pretend deference to the President; but any assertion of independence on the part of the President is bound to lead to a clash. Seeing only the results, but unaware of the causes, certain superficial observers are fond of saying that the President can control the Senate because of the President's power of patronage, thus unconsciously voicing the fear of Hamilton that "sometimes we are told that this fund of corruption is to be exhausted by the President in subduing the virtue of the Senate." But the power of the President to appoint is a power exercised only by the permission of the Senate. The President is not a free agent in the exercise of the appointing power. Unlike the king of England he does not deal with one man, the responsible head of the majority party in Commons. The President must deal with ninety Senators. It would be "discourteous" to a Senator for him to appoint a man who is personally offensive to that particular Senator, quite irrespective of the reasons that animate that Senator. Virtually the Senate has now become the appointing power, although to save the shadow of the Constitution appointments are still made by the President.

Hamilton explained why the convention deemed it wise that treaties should be ratified by the Senate. The President was not to be given that absolute authority possessed by a sovereign in the negotiation of treaties that would enable the President to betray his country if he were venal, but at the same time he was to be given such latitude as would insure "that perfect secrecy and immediate despatch" which are sometimes "requisite." As showing the relation that Hamilton conceived would exist between the President and the Senate in the negotiation and ratifi-

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cation of treaties he said: "Should any circumstances occur which require the advice and consent of the Senate he may at any time convene them. Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and despatch on the other."[1]

Once again we see how the spirit of the Constitution has been perverted by the assumption of the Senate. The President negotiates a treaty; but that treaty the Senate regards in the same light as it does an appropriation bill passed by the House. It is merely a scheme, a "project," an outline expressing the views of the negotiators, which the Senate will accept or reject at its pleasure; and of recent years the Senate has shown what amounts almost to a mania to amend treaties; and unless the President accepts the amendment a treaty that may have been the work of months of careful and intricate negotiations is wrecked. President McKinley, in his great desire to remain on harmonious terms with the Senate, permitted that body a further and unconstitutional grant of authority. By the terms of the treaty with Great Britain relating to the tenure and disposition of real and personal property, possessions of the United States beyond the seas were to be permitted to adhere to the convention upon notice "being given by the representative of the United States at London, by direction of the President." This the Senate amended to read "by direction of the treaty making power of the United States," which gives to the Senate the right to direct the American ambassador in London, for which no warrant can be found in the Constitution.

[1] *The Federalist*, No. 66.

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Jackson, jealous of his own prerogatives and the encroachments of the Senate, used this admonitory language in defining the line of division between the executive and legislative branches of the government. "The resolution of the Senate presupposes a right in that body to interfere in this exercise of executive power. If the principle be once admitted . . . . . the constitutional independence of the Executive Department would be as effectually destroyed and its powers as effectually transferred to the Senate as if that end had been accomplished by an amendment to the Constitution."

Grant, in returning to the House of Representatives a resolution directing the Secretary of State to acknowledge a despatch of congratulation, used this language: "I cannot escape the conviction that their adoption had inadvertently involved the exercise of a power which infringes upon the constitutional rights of the executive. . . . . The Constitution of the United States, following the established usages of nations, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers and in all official communications from them . . . . . The whole correspondence of the government with and from foreign states is entrusted to the President; that the Secretary of State conducts such correspondence exclusively under the orders and instructions of the President, and that no communication or correspondence from foreigners or from a foreign state can properly be addressed to any branch or department of the government except that to which such correspondence has been committed by the Constitution and the laws.[1]

The Senate now assumes the right not only to amend

[1]Richardson: Messages and Papers of the President, Vol. VII, p. 432.

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treaties, so that by the power of amendment it exercises the same control over the conduct of foreign relations as it does over the national purse, but also to be consulted in advance of and during the progress of treaty negotiations; and if it is not consulted in advance it resents the implied imputation of presidential distrust. That "perfect secrecy and immediate despatch," which Hamilton deemed requisite, are of course impossible if the Senate must be consulted in advance; and even after the unofficial advice of the Senate has been taken, Senators are not precluded from reversing their judgment. The late Secretary Hay complained bitterly of certain Senators opposing a treaty in the Senate the terms of which they had acquiesced in while that treaty was under negotiation. More than once I have heard Mr. Hay say that in dealing with foreign governments he felt as if he had one hand tied behind his back and a ball and chain about his leg, as he was always hampered by the Senate.

James Russell Lowell was asked by Guizot how long he thought the Republic of the United State would endure. "So long as the ideas of those who founded it continue dominant," was Lowell's reply. With this observation of an acute mind, which is food for serious reflection to those who would see the Republic endure, I leave the subject.

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NEGRO SUFFRAGE: THE CONSTITUTIONAL POINT OF VIEW

JOHN C. ROSE

The Constitution of the United States as amended provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[1] These words are plain. Everybody understands them. They mean, and every one knows that they mean, that, from the constitutional point of view, one question relative to the suffrage is no longer open. That question is the very one about which I am asked to write. From the political point of view, from the historical point of view, from the social point of view, from the economic point of view, and from the ethical point of view, there is much to be said about negro suffrage. For centuries yet to come there may be much to be said. From the constitutional point of view, accurately defined, there has been nothing to say since March 30, 1870. On that day the Secretary of State of the United States proclaimed that the Fifteenth Amendment had been ratified by the legislatures of twenty-nine out of the then thirty-seven States. The apparent assent of a number of these legislatures, perhaps, had not been a real assent. It might have been given under duress. Still, it had been given. The men who assumed to be the legislatures of other of these States may have had little moral and a very doubtful legal right to speak for them. Yet

[1]Fifteenth Amendment.

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they had spoken. Two years before the Supreme Court had dismissed the bill which the State of Georgia, or the persons or officials who claimed to speak for the State of Georgia, had filed against Secretary Stanton and Generals Grant and Pope.[1] Practically this decision amounted to a final determination that the validity of the reconstruction legislation could not be successfully assailed in the courts.

During the troubled decade immediately following the war that portion of the people of the South who were opposed to the Fourteenth and Fifteenth Amendments had little opportunity to express themselves through the legislatures of their States. The Conventions, State and National, of the Democratic Conservative Party were their mouthpieces. In Ford's Opera House in Baltimore in July, 1872, the National Democratic Conservative Convention, speaking for the white people of the South, pledged them to maintain "emancipation and enfranchisement and to oppose any reopening of the question settled by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution."[2] Since then there has been no question in any part of the country that the Fifteenth Amendment is in theory of law as much a part of the Constitution as is the First.

It was made a part of the Constitution for the sole purpose of assuring that from the constitutional point of view there should, as to the suffrage, be no negro question. Yet subconsciously, if not consciously, the great majority of all the white people of the old slave States have felt and feel that the Fifteenth Amendment had no moral sanction and is not binding on their consciences.

[1]Georgia *vs.* Stanton, 6 Wallace, 50.
[2]New York Tribune Almanac, 1873, p. 88.

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Among the millions of people who so feel are thousands of men who are holding, or who have held, office. Among those thousands are quite as many men of a high sense of integrity, and men who are as keenly alive to the binding force of their plighted word, as are to be found in any other section of this country or among any other people. Every man who has held any office, State or Federal, has sworn to support the Constitution of the United States.[1] For more than thirty years every man who has so sworn has known that the Fifteenth Amendment is a part of that Constitution. Yet an overwhelming majority of those Southerners who hold State and elective Federal offices feel that they are morally justified in evading and defeating the admitted purpose of the Fifteenth Amendment. Please bear in mind that I am not making this or any other statement in this paper in the way of either praise or blame.

Charles Sumner knew well that the Constitution of the United States declared that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequense of any law or regulation therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."[2] He was a man a little over prone, perhaps, to pride himself upon his unswerving integrity. He had many times sworn to support the Constitution of the United States. Yet, when he was asked by a fellow Senator whether he would return a slave who had escaped, he answered: "Is thy servant a dog that he shall do this thing."[3] When very many able and honest

[1]Constitution of United States, Art. 6.
[2]Constitution of the United States, Art. 4, sec. 2.
[3]Congressional Globe, Vol. 28, pt. 2, p. 1517.

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men so feel about any portion of the Federal Constitution, whether it be the fugitive slave section or the Fifteenth Amendment, a discussion of such a provision from a constitutional point of view solely is a barren and profitless task.

A proposal to discuss negro suffrage from the constitutional point of view suggests today to most men what is in fact a very different inquiry. They think of two questions. First, how far is it practicable for the white people of any State to deny or abridge the right of suffrage of such inhabitants of that State as have negro blood in their veins because they have such negro blood? Second, what can the Federal Government do to prevent discrimination on such ground.

The first of these questions may be answered by saying that in 1900 there were in the two States of South Carolina and Mississippi 350,796 adult male negroes.[1] The aggregate number of votes returned in both States for the Roosevelt and Fairbanks electoral ticket was 5443.[2] At least 2000 of these 5443, and perhaps more, must have been cast by white men. It follows that in those States not more than one adult male negro out of every 100 voted for President. It is clear, therefore, that it has in fact been possible for the white inhabitants of some of the States, for a time at least, so to abridge the right of suffrage on the ground of race and color as to deny that right substantially to all negroes.

In the teeth of the provisions of the Federal Constitution how has this result been brought about? Why is it that the disfranchised race has not been able successfully to appeal for protection to the letter and spirit

[1]Twelfth Census Population. Pt. 1, p. cxcix.
[2]New York Tribune Almanac, 1905, p. 377.

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of the Federal Constitution? Answering generally it may be said: First, because the powers of the Federal Government are limited; and, second, because Congress has not exercised those powers which the Federal Government has.

The Fourteenth and Fifteenth Amendments both expressly confer upon the Congress the power to enforce them by appropriate legislation. The Supreme Court has held, and has been clearly right in holding, that the power to enforce cannot be extended beyond that which is to be enforced.[1] Neither of those amendments deal in anywise with the action of individuals in their individual capacity. They are both prohibitions upon the States or the United States. Beyond that they do not go, and Congress in enforcing them can do no more than to insure as best it may that the States shall not in any way or by any instrumentality deny to their colored citizens the equal protection of the laws or deny or abridge the right of suffrage on account of race, color, or previous condition of servitude.

Congress cannot provide for the punishment of individuals who, having no official position and exercising none of the powers of the State, prevent a colored voter from voting, or deny to him the equal protection of the laws.[2]

The rule, of course, is different under the Thirteenth Amendment, because the language of that amendment is different. It declares that neither slavery nor involuntary servitude shall exist, and Congress is given power to enforce it.[3] The prohibition is against the existence of slavery; and wherever one man holds another as his slave, slavery exists. Congress can, therefore, provide for the punishment of any man who holds another in slavery.

[1]James *vs.* Bowman, 190 U. S., 127.
[2]Virginia *vs.* Rives, 100 U. S., 313.
[3]Clyatt *vs.* United States, 197 U. S., 207.

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The Fourteenth Amendment might in language similar to that of the Thirteenth have declared that within the United States, or in any place subject to their jurisdiction the privilege or immunities of citizens of the United States shall not be abridged, nor shall any person be deprived of life, liberty, or property, without due process of law; nor shall any person be denied the equal protection of the laws. Had it done so the relation of the people and the States to the Federal Government would have been revolutionized. The jurisdiction of that government would have been extended over nearly, if not quite, the entire field of the criminal, and over much of that of the civil, law. Every murder could have been made punishable in the courts of the United States. These courts could have taken cognizance of every case in which it was alleged that one person had unlawfully deprived another of any part of his property. Such an extension of the Federal power would have been assented to by very few of the people in any part of the country. The limitation of the scope of the Fifteenth Amendment to the prohibition of State action was by no means so obviously necessary. In fact, however, its phraseology was modeled on that of the Fourteenth and not on that of the Thirteenth Amendment. It has, therefore, received the same construction as the Fourteenth.[1]

The practical results of the restriction of the powers of Congress to the prevention of State action denying or abridging the right of suffrage on account of race, color, or previous conditions of servitnde have been important. In the first place, at the very time when Congress was at once most able and most willing to enforce the amendment, the leaders of Congress either did not appreciate

[1]James *vs.* Bowman, 190 U. S., 127.

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what limitations its language imposed upon congressional action or were careless in seeing to it that the laws they passed were kept within such limits. Before the Supreme Court had declared invalid much of the enforcement legislation, power to legislate had passed from the Republicans.[1] When it came back, times and men had both changed.

No matter how zealous Congress had been for the protection of the negroes in the exercise of the right of suffrage, the fact that the Fifteenth Amendment was directed solely to the prohibition of State action would have made the task difficult. It might be easy to show that at a purely State election particular colored citizens or many colored citizens had been interfered with in attempting to exercise their right of suffrage. It might be difficult to show beyond the possibility of reasonable doubt that this interference was on account of race, color, or previous condition of servitude.

The Fifteenth Amendment does not prescribe qualifications for suffrage. That it leaves to the several States. They may make any they see fit provided they do not deny or abridge the right of suffrage on account of race, color, or previous condition of servitude.[2]

A much larger proportion of whites than of blacks may possess any particular qualification. That fact alone is no argument at all against the right of a State to prescribe it. The qualification may be one which reasonable people may think desirable, irrespective of whether the State has or has not any negro inhabitants at all.

In South Carolina a simple educational qualification enforced with entire honesty and strict impartiality would disfranchise 60,000 or 70,000 more negroes than

[1]United States *vs.* Reese, 92 U. S., 214, Oct. Term, 1875.
[2]Pope *vs.* Williams, 193 U. S., 621.

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whites. Under universal manhood suffrage there would be a negro majority in that State of upward of 20,000. If the right to vote was limited to those adult males who can both read and write there would be a white majority of nearly 45,000.[1]

Connecticut, in its Constitution, declares that no one shall vote unless he is able to read any section of the Constitution or of the statutes of the State in the English language and write his name.[2] What Connecticut can do, so can South Carolina.

The first State Constitution of Maryland restricted the suffrage to male citizens who possessed fifty acres of land or 30 pounds worth of real or personal property.[3] In Louisiana a similar qualification would disfranchise many more thousands of negroes than whites.

No man can vote in Pennsylvania unless at least one month before election he has paid his poll or other tax.[4] The amount of the poll tax and the time at which it must be paid each State may prescribe for itself. If Alabama sees fit to fix it at $1.50 a year and to require that every voter must, six months before the day of election, have paid all poll taxes assessed against him for each and every year since 1900, it can do so. The payment of such a tax by other persons than the voter may easily be a form of bribery and corruption. The State may, therefore, properly require the voter to pay his poll tax in person. Such requirements in Alabama would close the door of the polling room to more blacks than whites.

[1]Twelfth Census Population, Pt. I, p. 996.

[2]Constitution of Connecticut, Amendment XI.—Poore's Constitutions and Charters, Vol. I, p. 268.

[3]Constitution of 1776, Art. II.—Poore's Charters and Constitutions, Vol. I, p. 821.

[4]Constitution of 1873, Art. VIII, Sec. 1.—Poore's Charters and Constitutions, Vol. II, p.1583.

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Massachusetts does not allow a pauper to vote.[1] Alabama has the same right. If the people of Alabama in good faith believe that thrift and industry can be encouraged by prohibiting from voting any non-property holding illiterate who has not been regularly engaged in some lawful occupation for the greater part of the preceding year, they have the right to do so. Under the actual conditions in Alabama such a provision, even if fairly enforced, would take the suffrage away from few whites and from many negroes.

The validity of what may be called the disfranchising machinery of the new Southern constitutions, considered apart from what we may style the enfranchising, cannot, it is believed, be successfully challenged. In each of them men convicted of certain specific offenses are disfranchised. So they are in many, if not most, Northern States. The list of crimes which work disfranchisement in the States of the "Black Belt" are, for the most part similar to those which produce the same result elsewhere. There are differences. In South Carolina a man convicted of fornication or adultery is disfranchised for life.[2] In Maryland the former is not punishable at all, and a ten dollar fine is the maximum penalty for the latter.[3] It is possible that the enumeration of such offenses as fornication, adultery, bigamy, and wife-beating among the crimes which work a forfeiture of citizenship may have been inspired, in part at least, by the belief that they were offenses to the commission of which negroes were prone, and for which negroes could be much more readily convicted than white men. No court could be asked to say that a

[1]Third Amendment to Constitution of 1780.—Poore's Charters and Constitutions, Vol. I, p. 973.

[2]Constitution of 1895, Art. II, sec. 6.

[3]Maryland Code of Public General Laws, 1904, Art. 27, sec. 5.

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State had not the right to add disfranchisement to the other punishment entailed by conviction for such offenses.

All the Southern States which have recently adopted new constitutions make the payment of a poll tax a condition precedent to the exercise of the right of suffrage.[1] In none of the States is the annual tax less than one dollar. In none greater than two dollars.

North Carolina does not require the payment of any back taxes except those for the year preceding that in which the voter offers to vote.[2] Louisiana[3] and Mississippi[4] provide that he must pay for the preceding two years, and Virginia for the preceding three years.[5] Alabama is content with nothing short of the payment of all poll taxes levied on him since the year 1901.[6]

The clauses of the South Carolina Constitution on the subject are to my reading ambiguous.[7] They may be construed either as requiring the payment of all poll taxes which have ever been assessed against the voter, or only those for the preceding year. What construction they have received in practice I do not know.

In some of these States at least the poll tax is apparently imposed rather to discourage voting than to raise revenue. Thus the Constitution of Alabama declares that no legal process or any fee or commission shall be allowed

[1]Virginia Constitution of 1902, Art. II, sec. 20, first paragraph; North Carolina Suffrage Amendment, 1902, Art. VI, sec. 4; South Carolina Constitution, 1895, Art. II, sec. 4, par. *A*; Alabama Constitution, 1901, Art. VIII, sec. 178; Mississippi Constitution, 1891, sec. 241; and Louisiana Constitution, 1898, Art. 198.

[2]North Carolina Suffrage Amendment, Art. VI, sec. 4.

[3]Louisiana Constitution, Art. 198.

[4]Mississippi Constitution, sec. 241.

[5] Virginia Constitution, Art. II, sec. 20.

[6]Alabama Constitution, Art. VIII, sec. 178.

[7]South Carolina Constitution, Art. II, sec. 4.

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for the collection of the poll tax.[1] Louisiana says that poll taxes shall be a lien only upon assessed property and no process shall issue to enforce the collection of the same except against assessed property.[2] All the States require the payment of these taxes to be made a long time before the election.

In North Carolina, South Carolina, and Virginia the payment must be made at least six months before election day;[3] in Alabama and Mississippi[4] before the first of February preceding the election; and in Louisiana on or before the thirty-first of the preceding December.[5]

Any adult male negro who has not forfeited his right of suffrage by conviction of crime, who has paid his poll taxes as required by law, and who possesses the qualifications of residence required of all other voters is in theory at least entitled to vote in Mississippi if he can read the Constitution of that State;[6] in Virginia,[7] North[8] and South Carolina,[9] and Louisiana[10] if he can read and write; in Alabama if he can read and write and has been regularly engaged in some lawful employment, business, occupation, trade, or calling for the greater part of the twelve months preceding the time at which he offers to register;[11] in Louisiana[12] and South Carolina[13] if he be the owner of

[1]Alabama Constitution, Art. 8, sec. 194.
[2]Louisiana Constitution, Art. 198.
[3]North Carolina Constitution, Art. VI, sec. 4. South Carolina Constitution, Art. II, sec. 4. Virginia Constitution, Art. II, sec. 38.
[4]Alabama Constitution Art. VIII, sec. 178. Mississippi Constitution, sec. 241.
[5]Louisiana Constitution, Art. 198.
[6]Mississippi Constitution, sec. 244.
[7]Virginia Constitution, Art. II, sec. 20.
[8]North Carolina Suffrage Amendment, Art, VI, sec. 4.
[9]South Carolina Constitution, Art. II, sec. 4.
[10]Louisiana Constitution, Art. 197, sec. 3.
[11]Alabama Constitution, Art. VIII, sec. 181.
[12]Louisiana Constitution, Art. 197, sec. 4.
[13]South Carolina Constitution, Art. 11, sec. 4.

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real and personal property assessed at $300, whether he can read and write or not; and in Alabama though he cannot read or write, and whether he has been employed or not, if he or his wife own forty acres of land on which they live, or if either he or she have real or personal property of the assessed value of $300, or more.[1]

A negro Republican in any one of those States would very probably reply that however reasonable the qualifications may seem in theory, in practice there are so many difficulties thrown by the registration officers in the way of the registration of negro voters that none except those who have a liberal allowance of time, patience, persistence, intelligence, and money can succeed in getting on the registration books. He might refer to such a provision as that of the Alabama Constitution which authorizes the register to require the applicant to state under oath the name or names of all of his employers for the last five years, and makes any willfully false answer perjury.[2] He might not unreasonably contend that the purpose of such a provision was to render it almost impossible for negro laborers safely to apply for registration. This may be true, but if true it is not relevant to the inquiry whether it is within the power of the State to prescribe the qualifications it has prescribed. The abuse of the discretionary powers conferred upon the registration and election officers is another branch of the subject and will be referred to somewhat later on.

No one of these qualifications are qualifications which it can be seriously contended a State has not the right to impose. There are doubtless wise people who think that every one of them are qualifications which it would be

[1]Alabama Constitution, Art. VIII, sec. 181.
[2]Alabama Constitution, Art. VIII, sec. 188.

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desirable to apply everywhere. By so saying, of course, I do not mean to imply that there might not be other quite as wise people who would think that no one of them ought to be applied anywhere.

The criticisms which have been directed at the new Southern constitutions resemble somewhat the objections which some people have to Calvinistic theology. There are those who are perfectly willing to admit that most, if not all, men are in their natural state desperately wicked and richly deserve damnation. It is not, however, quite consonant with their sense of justice that out of the whole human race some, no better than the rest, shall by the mere good pleasure of the Deity be elected to everlasting life, while the rest remain forever under the condemnation of wrath. So there are persons who say that the disqualifications imposed by the new constitutions of the Southern States may be wise or unwise; that whether they are wise or unwise is for each State to determine for itself, but that, if they be imposed, to exempt all white men and few or no negroes from them is contrary both to justice and to the letter and spirit of the Fifteenth Amendment.

Speaking generally, it may be said that in every one of the six Southern States which have adopted new constitutional regulations for the suffrage, those regulations have been so framed or administered that no white man who was a voter at the time they went into effect has been disfranchised by them. Sometimes the white voters have been protected by the very terms of the new constitutions. Thus, Louisiana[1] and North Carolina[2] declare that all men who were voters in any State of the Union before

[1]Louisiana Constitution, Art. 197, sec. 5.
[2]North Carolina Suffrage Amendment, Art. VI, sec. 4.

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January 1, 1867, and in Louisiana the sons and grandsons of such men, not less than 21 years of age in 1898, and in North Carolina all lineral descendants of such men who were or may become voters before 1908 shall remain for life qualified to vote in spite of the fact that they may not possess either the educational or the property qualifications, one or the other of which is required of all other voters.

Every one knows that this so-called "grandfather clause" was devised solely for the purpose of exempting all white men from the necessity of showing that they possessed those qualifications which were required of all negroes. It is possible to argue that the ability to vote in such manner as is conducive to the best interests of the State may in some rough and general way be hereditary. That was a contention, however, which was made when the Fifteenth Amendment was under consideration, and the adoption of that Amendment decided it finally in the negative.

If the North Carolina and Louisiana forms of the "grandfather clause" shall come before the Supreme Court of the United States in such a way as to make it the right and duty of that Court to pass upon their validity, I personally believe that they will be held invalid.

The corresponding clause in Virginia is more skillfully drawn.[1] It authorizes the registration of every non-property owning illiterate, who prior to the adoption of the new Constitution of Virginia had served in time of war in the army or the navy of the United States, or of the Confederate States, or who is a son of any one who did so serve. While this qualification in Virginia is possessed by many more white than black men it would

[1]Virginia Constitution, Art. II, sec. 19.

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include an appreciable number of the latter. It might, therefore, very possibly be held valid. The "grandfather clause" in the Alabama Constitution differs but slightly from the Virginian.[1] In Alabama it enfranchises not only the sons but all lawful descendants in every degree of persons who served in the army or navy of the United States or of the Confederate States in time of war.

In the other States on the face of their new constitutions there is nothing which can be claimed to be a discrimination between whites and negroes. In them, as in all the Southern States which have adopted new constitutions, the discretionary powers conferred upon the officers of registration doubtless enable them to enfranchise white men and to disfranchise black men. In Mississippi any man can register, although he cannot read, provided he is able to understand a section of the Constitution when read to him and give a reasonable explanation of it.[2] In South Carolina[3] and Virginia[4] at the first registration under the new constitutions, illiterate voters had the same privileges as they have permanently in Mississippi. There is in this no apparent discrimination against the negro voter. It is, therefore, not a provision which is invalid on its face. So the Supreme Court of the the United States has held.[5]

In Alabama, in addition to the "grandfather clause" already referred to, the boards of registry were given the opportunity to protect white voters by a provision that in addition to those qualified under the "grandfather clause" the only persons who should be entitled to vote upon the

[1]Alabama Constitution, Art. VIII, sec. 180.
[2]Mississippi Constitution, sec. 244.
[3]South Carolina Constitution, Art II, sec. 4.
[4]Virginia Constitution, Art. II, sec. 19.
[5]Williams *vs.* Mississippi, 170 U. S., 213.

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adoption of the new Constitution were those persons who were of good character and who understood the duties and obligations of citizenship under a republican form of government.[1] On the face of this qualification what could be fairer? No one ought to vote who is not of good character, and who does not understand the duties and obligations of citizenship under a republican form of government. How fortunate is the State which can organize in each county a board of registry capable of determining who among their fellow-citizens are and who are not of good character and who do and who do not understand the duties and obligations of citizenship under a republican form of government!

We all know why this unlimited discretion was given to the Board of Registry in Alabama. Yet the Constitution of Connecticut has since 1818 required that an elector in that State shall sustain a good moral character.[2] For upward of a century the Constitution of Vermont has declared that only persons of quiet and peaceable behavior shall be admitted to be freemen in any town of that State.[3] It is true that no one has heard that in either Connecticut or Vermont any one, except possibly some utterly notorious offender, has ever been disfranchised because he was not of good moral character, or was not of quiet and peaceable behavior. There is much reason to believe that in Alabama a very large number of persons were unable to convince the Board of Registry that they were of good character and that they understood the duties and obligations of citizenship under a republican form

[1]Alabama Constitution, Art. VIII, sec. 180.

[2]Constitution of 1818, Art. 6, sec. 2.—Poore's Charters and Constitutions, Vol. I, p. 263.

[3]Constitution of 1793, sec. 21.—Poore's Charters and Constitutions, Vol. II, p. 1880.

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of government, or at all events that they would have been unable to convince the Board of Registry had they thought it worth while to try to so do. On its face, however, this provision is not a discrimination on account of race, color, or previous condition of servitude.

It has been already pointed out that the Fifteenth Amendment prohibits a State from denying or abridging the right of suffrage on any of those grounds, and it does not prohibit individuals acting in their individual capacity from doing so. Registrars or a board of registry while discharging their duties are not acting in their individual capacity. A State acts only through individuals who are its officers and agents. What they do in the discharge of the functions committed to them by the State is done by the State. The action they take is, within the meaning of the Fifteenth Amendment, the action of the State. It follows, therefore, that there is no constitutional reason why the Federal Courts may not be empowered to inquire as to whether any officer of registration has refused registration to negroes because they were negroes while registering white men who had no better qualifications.

If this be true, or if the opinion which has been expressed that the "grandfather clauses" in the Constitutions of Louisiana and North Carolina are on their face in conflict with the provisions of the Fifteenth Amendment is correct, why is it that Federal courts have not so declared?

The short answer is because the powers which Congress has have not been exercised. Many years ago Congress provided that any officer or other person charged with any duty in the selection or summoning of jurors who should exclude or fail to summon any citizen on account

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of race, color, or previous condition of servitude should, on conviction thereof, be deemed guilty of misdemeanor and be fined not more than $5000.[1] The Supreme Court has held that such a statute was within the powers conferred upon Congress by the Fifteenth Amendment, and that a county judge in Virginia who excluded or failed to summon negro citizens because they were negroes could be tried, convicted and sentenced therefor.[2] Under the Fifteenth Amendment Congress could, I take it, provide for the punishment of any State official who, in the exercise of any discretion conferred upon him by the State in the matter of the suffrage, discriminates against a negro citizen because he is a negro. Congress has not done so.

It is possible that the power of Congress might suffice to make punishable the act of a member of a constitutional convention or of a State legislature who could, to the satisfaction of a jury beyond the possibility of reasonable doubt, be shown to have used the powers given him by his official position to deny or abridge the right of suffrage on account of race, color, or previous condition of servitude.

In the case of the Virginia county judge, already referred to, it was urged that the defendant could not be punished because whatever he did was a judicial act. The Supreme Court concluded that it was not properly a judicial act at all.[3] The Court went on to say, "but if the selection of juries could be considered in any case a judicial act, could the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the State's statute. That statute

[1]Sec. 4, Act of March 1, 1875—U. S. Statutes at Large, Vol. XVIII, p. 336.
[2]Ex parte Virginia, 100 U. S., 339.
[3]Ex parte Virginia, 100 U. S., 339.

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gave him no authority when selecting jurors from whom a panel might be drawn for a Circuit Court to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion." The Constitution of the United States provides that no State shall deny or abridge the right of suffrage on account of race, color, or previous condition of servitude. It might be argued that no member of a State legislature or of a State constitutional convention could plead to an indictment charging him with having, as such member, conspired with others to deny or abridge the right of suffrage on account of race, color, or previous condition of servitude, that what he did was done in the exercise of his discretion as such member and for that he was not answerable in the courts. I do not say that the Supreme Court would hold that the argument was sound. I only say that I think it would have held it sound had there been such a statute twenty-six years ago, and had the case then arisen under it and been argued and decided at the October Term, 1879. There is one caution I want to give in this connection. In this or in any other statement of my opinion as to what might be done I do not wish it to be understood that I am arguing that it should be done or that it should not be done. St. Paul has said that all things that are lawful are not expedient.

Many persons have said that the Supreme Court has upheld the right of the Southern States to disfranchise the negroes in the way in which they have disfranchised them. Some of these persons were not lawyers, and did not know what the Court had decided. Some of them were lawyers, and for political purposes said what they knew was not so. The Supreme Court has held that a constitution was not necessarily invalid because it con-

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ferred upon various administrative officers discretionary powers ample, if unscrupulously used, to disfranchise negroes because they were negroes.[1] There is nothing new or startling about such a ruling. When a plaintiff comes into court it is usually not sufficient for him to show that the thing of which he complains might have hurt him. He must go further and show that it has hurt him.

In other cases the attacks in that court on those constitutions or upon the way in which they were administered has failed because the court has been of opinion that the questions of the validity of the provisions of the State constitution or of the practices of the State officials under those constitutions could not be raised in the way those who asserted their invalidity had attempted to raise them. It is one of the commonest phenomena in legal history that the development of remedies does not keep pace with the need for them. As far back as the fourteenth century in the thirteenth year of Edward I. the Statute of Westminster the Second bore testimony to the fact that the forms of action which had up to that time existed were inadequate to do right between man and man. Through the centuries this has been a recurring difficulty. Sometimes it has been removed by that expansion of the law which worsted advocates are wont to stigmatize as judicial legislation. At other times it has not been so easy to deal with. The relief then has had to come, if at all, from the legislature.

In the absence of appropriate action by Congress various efforts have been made to get the Supreme Court to say that the recent actions of the Southern States have violated the Fifteenth Amendment.

A negro was indicted in one of the State courts of

[1]Williams *vs.* Mississippi, 170 U. S., 213.

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Mississippi. His counsel contended that by the laws of Mississippi, jurors were required to be selected from the poll lists, and that the poll lists were made up under the new Constitution of that State.[1] He further alleged that the purpose of that new Constitution was to disfranchise negroes because they were negroes; that to that end, power was given to the officers of registration under the Constitution to disfranchise negroes, and that such power had been so used. The case was carried to the Supreme Court. That tribunal, however, was of opinion, first, that the laws of Mississippi did not require the jurors to be selected from the poll lists; and, secondly, that the allegations as to how the officers of registration actually had discriminated against negroes were not sufficiently definite and precise.

It is obvious that this method of raising the constitutional question is not open in any State in which the jury list is not by law required to be made up from the registry. To prevent misconception, it should be said, however, that this does not mean that objection cannot be successfully taken in any court to the failure or refusal to summon negroes on the jury because they are negroes.[2] It makes no difference whether this failure is the result of a provision in the constitution or statutes of a State, or is brought about by the refusal of the officers charged with the duty of selecting jurors to select any one with negro blood in his veins.

In South Carolina application was made to the Circuit Court of the United States to compel by injunction an officer of registration to register a negro voter.[3] Unfortu-

[1] Williams *vs.* Mississippi, 170 U. S., 213.
[2] Rogers *vs.* Alabama, 192 U. S., 226.
[3] Mills *vs.* Green, 159 U. S., 651.

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nately for the plaintiff the election for which he sought to be registered had been over some years before the case was reached in the Supreme Court. The bill was dismissed by the Supreme Court because it had become impossible for the Court to give him the relief for which he had asked.

Still later a negro voter in Alabama sought, by a bill in equity filed in the Circuit Court of the United States for one of the Alabama districts, to attack the validity of the Constitution of that State.[1] This bill alleged that the whole purpose of the constitutional provisions with reference to suffrage was to make unlawful discrimination against the negroes, and that such discrimination had been carried out in fact by the Boards of Registry. The bill prayed that the defendants, the Board of Registry, should be required to enroll the name of the plaintiff and of other colored voters who had appeared before them upon the registration lists, and that certain sections of the Constitution of Alabama should be declared void, as contrary to the Fourteenth and Fifteenth Amendments. The Supreme Court dismissed the bill for three reasons. First, equity has no jurisdiction over political matters; second, the plaintiff asked the court to find that the whole registration scheme of the new Constitution was fraudulent. If the court should so find he asked that his name and other names be enrolled on the registry. The Supreme Court thought that such request was in effect tantamount to his asking the court to take part in administering a fraud. Third, the bill alleged that the new Constitution was a scheme of the State and of the white people of the State to take suffrage away from the negroes. If that be so, says the court, it is beyond the powers of any court of equity to remedy such a wrong. The court

[1] Giles *vs.* Harris, 189 U. S., 474.

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cannot through its officers take charge of and operate all the election machinery of Alabama. The court says "that apart from damages to the individual relief from a great political wrong, if done as alleged by the people of a State and by the State itself, must be given by them or by the legislative and political departments of the Government of the United States."

Obviously in this statement is found the real explanation of the difficulty in the way of those who seek through the courts to compel the dominant race in a great section of the country to do that which that race is almost unanimously determined it will not do.

It is true that the Supreme Court has expressly left it open whether under section 1979 of the Revised Statutes of the United States a suit at law against any member of a board of registry who unlawfully discriminates against a citizen on the ground of his color may not be brought in the Circuit Court of the United States for the district in which the defendant lives.[1]

Except in Mississippi the broadly discretionary clauses of the various State constitutions thus far adopted are not permanent in their nature. They were limited to what was practically the first registration of voters under the new constitutions. In most cases arising out of the exercise of powers conferred by these clauses the statute of limitations could now be pleaded to any suits brought under section 1979. It must be remembered, moreover, that in no case at law could damages be recovered except by a verdict of a jury of the district. In the state of public opinion among the white people of those States it is not likely in such a suit any negro plaintiff could recover substantial damages.

[1]Giles *vs.* Harris, 189 U. S., 474.

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In what has been said no reference has been made to the plenary power of Congress to control congressional elections.[1] Congress can take complete control of them. It could provide for the appointment by Federal authority of the persons who should register the voters for such elections.[2] Those officers of registration would, of course, be bound by the qualifications prescribed by all constitutional State laws. In case Congress should provide for the Federal registration of voters for Federal elections, the Federal courts would probably be called upon to determine two important questions. In the first place, it would be very easy for a Federal officer of registration to refuse to register any one under the "grandfather clause." The voters so refused registration would have to seek their redress if anywhere in the Federal courts, and might have to set up the validity of the "grandfather clause" as the basis of their case. In the second place, could the discretionary powers conferred by the State laws upon the officers of registration, such, for example, as in Mississippi, to determine whether a man who cannot read the Constitution can understand it, be exercised by Federal officials?

It is probable that even under the permanent constitutional provisions of the Southern States a very much larger number of negroes would be registered by Federal registration officials than is now the case when that power is exercised solely by State officers, and for two reasons: First, and most important, very many more negroes would probably try to register; and, secondly, those who did try would find the atmosphere of the Federal registration offices less "chilly" (to borrow a phrase from the recent insurance investigation) than they now find the

[1]Ex parte Siebold, 100 U. S., 371.
[2]Ex parte Yarborough, 110 U. S., 651.

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corresponding State offices. The powers of Congress not only to provide for the entire conduct of Federal elections but to protect citizens of the United States in the exercise of all the privileges and immunities to which as citizens of the United States they are entitled, are, of course, ample.[1] They are limited only by those limitations which for the protection of the rights of individuals attach to every exercise of the Federal authority. The effectiveness of any such legislation, no matter how skillfully devised and thorough it may be, will depend upon the degree to which it is obeyed. In the last analysis obedience not voluntarily given must, for the most part, be compelled by force applied through the instrumentality of criminal prosecutions. In the face of the united and passionate opposition of the white people of the South such prosecutions in the past have failed to accomplish any permanently useful results. It is probable that convictions would be difficult to obtain even where the offense was flagrant and the guilt of the defendants clear.

The law now requires that jurors in the Federal courts shall be selected in a manner that ordinarily brings into the box men of each party in approximately equal numbers. It is true that the jury laws may be so changed as to facilitate the securing of convictions. But convictions brought about in such manner have little deterrent and no moral value. The situation would again be what it was thirty years ago. I remember reading in some Southern paper, I think a Charleston one, that in a prosecution for a violation of the Federal election laws the attorney of the United States had exercised very freely certain powers of challenge or of requiring objectionable jurors to stand aside. He finally in this manner secured a

[1]United States *vs.* Cruikshanks, 92 U. S., 542.

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jury to his liking. When he and the counsel for the defense went out at the noon recess the latter said to the former, "You have a jury that would convict the Apostle Paul." "Yes," said the District Attorney, "but if I had not done what I did I would have a jury which would not have convicted Judas Iscariot."

The purpose of the Fourteenth and Fifteenth Amendments is to make the rights and privileges of every man born or naturalized in the United States dependent upon himself and not upon his race, color, or previous condition of servitude. Their spirit requires that each man shall be judged by his own qualities of head and heart and not by the real or supposed qualities of head and heart of the majority of those who are of his race or color. There are those who believe that so understood those amendments rest upon the golden rule and the second of the great Commandments, whatever might have been the motives of the majority of those who were most active in securing their enactment. Those who so believe long for the day when the relations of the two races shall in truth and in deed be controlled by what they believe to be the real life principle of those amendments. That can never be until the white people of the South, or a dominant portion of the white people of the South, believe that it should be. Legislation imposed, and in large part enforced, from without, can under the most favorable circumstances secure little for the negro except some formal legal rights which standing alone are not of the greatest value. The enactment, or even the proposal of such legislation from the outside, may by arousing sectional feeling and stirring up race prejudice cost the negro more than the statute books and criminal courts can give him.

Let those who believe that whether his skin be white

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yellow, red, brown, or black, a man's a man for a' that, be of good cheer. Either they are right or wrong. If the latter they will some day be thankful that their brothers in the South have not been able to see with their eyes. If the former, in the course of ages the Lord will see to it that as always his judgments are true and righteous altogether. When that day comes, if it does come, it will be under God because the white men of the South have come to believe that all legal rights and privileges should be enjoyed equally by both races. It cannot come in any true sense otherwise. Those who do not share the present feelings and convictions of the overwhelming majority of the white people of the South must walk warily. At the best, they can do only a little to hasten the coming of the day they long for. They can do much to postpone it.

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RACIAL DISTINCTIONS IN SOUTHERN LAW

GILBERT THOMAS STEPHENSON

The suffrage clauses recently adopted by six of the Southern States, beginning with Mississippi in 1890 and ending with Virginia in 1902, have disqualified for the elective franchise a majority of the negroes of voting age without appreciably diminishing the possible number of white voters. In other words, there have been racial distinctions in the matter of suffrage without their being so defined in the letter of the law. Now, the question is: Are these suffrage distinctions the only racial distinctions found in the Southern law, either expressed or implied, or are they only members of a group of such distinctions which have been evolving since the negro has been a free man? In this paper it shall be my aim to show briefly that the latter is the case, that there are other racial distinctions recognized in the Southern law, that some of the distinctions once present in Southern codes and constitutions have since been dropped, and that others have been introduced from time to time. And by making the suffrage distinctions only links of a chain, I hope that we shall arrive at some conclusion as to the trend of Southern legislation with regard to the negro.

The general subject of racial distinctions is practically limitless in extent. Many of these distinctions are as intangible as race prejudice itself and take various methods of expression. Instead, therefore, of undertaking a general discussion of this inexhaustible subject, I shall narrow it to more manageable proportions by treating only one of its many phases.

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Racial distinctions are of two classes—customary and legal. The former have been developing ever since the first slave-ship landed on the coast of Virginia in 1619, and, like all customs, do not admit of satisfactory treatment within the metes and bounds of brief discussion. The legal distinctions are more definite, and will bear subdivision. There are (1) what we may call the common law distinctions, and (2) the constitutional and statutory distinctions. By the former, I mean racial distinctions that actually exist in the court-room. Do the negro and the white man stand on an equal footing before the law? Is the negro who commits a petty theft punished equally with the white man who is guilty of the same offense? Is the negro who commits murder upon a white man given the same sentence as the white man who kills a negro under the same circumstances and with similar provocation? Does the testimony of a negro weigh as heavily with the court as that of a white man? Interesting as these questions are, they must be excluded from this discussion. Thus we are left with only those racial distinctions which exist at present, or have existed, in the letter of the law of the Southern States.

And by Southern States I mean all those which had not emancipated their slaves prior to Lincoln's Proclamation. These, of course, include all the States of the Southern Confederacy, and besides, Missouri, Kentucky, and Maryland. There are or have been, no doubt, racial distinction in the laws of other States, but we must pass them by for the present.

In point of time we shall not consider the numerous distinctions which existed while the negro was still a slave, but shall take them from the date of his emancipation, when he was supposedly put upon a legal equality with the white man, and trace them to the present day.

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When, in 1865, the Southern States found their slaves turned into freedmen, they could not conceive of negroes being or becoming an integral part of the body politic, but rather thought that particular arrangements for them should be made. Accordingly, three of the States—Georgia,[1] Mississippi,[2] and Texas[3]—made provisions in their constitutions for special legislation with regard to the negro.

Among the first questions to arise was as to who should be included in the application of this special legislation. For the emancipated slaves were, racially considered, a heterogeneous lot, varying from the brightest mulatto, as white as a Caucasian, to the full-blooded African, as black as "the Ace of Spades;" and surely such extremes could not be included under the general term "negro." Consequently the word "negro" is found very seldom in Southern law; but in its stead the words "person of color" are used. And a "person of color" includes full-blooded negroes, mulattoes, mestizos, and all persons descended from negro ancestors to the third generation, inclusive, although one ancestor in each generation may have been white.[4] Tennessee[5] and Arkansas[6] consider one a person of color who has the slightest visible trace of negro blood; while South Carolina[7] is so lenient as to consider a person white who has only one-eighth of negro blood.

[1]Constitution, 1865, Art. II, sec. 5.
[2]Constitution, 1865, Art. VIII.
[3]Constitution, 1866, Art. VIII.
[4]Code of Alabama, 1896, sec. 2, p.112; Statutes of Arkansas, 1894, sec. 6229, p. 1375; Laws of Florida, 1865, p. 30; Laws of Georgia, 1865–66, p. 239; Laws of Missouri, 1864, p. 67; Laws of South Carolina, 1865, p. 271; Laws of Tennessee, 1865–66, p. 65; Laws of Texas, 1884, p. 40.
[5]Laws of Tennessee, 1865–66, p. 65.
[6]Statutes of Arkansas, 1894, p. 1375.
[7]Laws of South Carolina, 1865, p. 271.

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Moreover, it was necessary to fix the marital relations of these persons of color, which had been very irregular during slavery. Most of the States simply passed acts legalizing all slavery marriages.[1] Kentucky[2] and Maryland,[3] however, required negroes who had been married under the slave code to file a statement of such marriage with the Clerk of the County Court and obtain a certificate; while Florida[4] and Missouri[5] required all negroes claiming to be husband and wife to be remarried before a certain date. The laws which fixed the marital relations of negroes also legitimatized their children and made them legal heirs of the property of their parents.

The status of negro laborers was not as easily determined as the family relations. A number of the States made special provisions for negro apprentices. Mississippi[6] and South Carolina[7] went farthest in this sort of legislation, though Kentucky[8] and North Carolina[9] followed in their wake. In South Carolina and Mississippi the parents of colored children might apprentice them to suitable masters—boys until they were twenty-one; girls until they reached eighteen. If the parents were dead or were paupers or were not bringing up their children in the habits of honesty and thrift and good moral conduct, the magistrate or some other county official was directed to proceed to apprentice such children, preference

[1]Laws of Alabama, 1899, p. 135; Laws of Florida, 1866, p. 22; Laws of Georgia, 1866, p. 156; Laws of South Carolina, 1865, p. 291; Laws of Tennessee, 1865–66, p. 65; Laws of Virginia, 1865, p. 85.

[2]Laws of Kentucky, 1865–66, p. 37.

[3]Laws of Maryland 1867, p. 858.

[4]Laws of Florida, 1865, p. 31.

[5]Laws of Missouri, 1864, p. 68.

[6]Laws of Mississippi, 1865, pp. 86–90.

[7]Laws of South Carolina, 1865, pp. 292–295.

[8]Laws of Kentucky, 1865, pp. 49–50.

[9]Laws of North Carolina, 1874–75, p. 92.

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usually being given to former masters. The master had full right over his apprentice, the same as a parent over his child or a guardian over his ward. He might inflict humane corporal punishment; he might recapture him if he ran away. The master obligated himself to teach his apprentice a trade, usually husbandry, and to teach him to read and to write; and at the end of his apprenticeship, to pay him a sum of money—not over sixty dollars in South Carolina.

In nearly all of the Southern States all labor contracts for more than one or two months between white persons and negroes had to be in writing, read to the negro, attested by two credible white witnesses, and approved by the magistrate or other county officials.[1] As in the case of apprenticing, South Carolina went farthest in her requirements of colored contract laborers. The colored laborer was to be known as "servant" and his white employer as "master." His duties were enumerated in the minutest detail. For instance, "On farms and in out-door service, the hours of labor except on Sunday, shall be from sunrise to sunset, with a reasonable interval for breakfast and dinner. Servants shall rise at the dawn in the morning, feed, water and care for the animals on the farm, do the usual and needful work about the premises, prepare their meals for the day, if required by the master, and begin farm or other work by sunrise. The servant shall be careful of all the animals and property of his master, and especially of all animals and implements used by him, shall protect the same from injury by other persons, and shall be answerable for all property lost,

[1]Laws of Florida, 1865, pp. 32–33; Laws of Kentucky, 1866, p. 52; Laws of Mississippi, 1865, pp. 83–84; Laws of South Carolina, 1865, pp. 299, *et seq.*; Laws of Virginia, 1865–66, p. 83.

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destroyed or injured by his negligence, dishonesty or bad faith. . . . Servants shall be quiet and orderly in their quarters, at their work and on the premises, shall extinguish their lights and fires and retire to rest at reasonable hours." The servants might leave the premises on Sunday, but they had to be back by sunset. But they could never leave without the expressed consent of the master, neither could they have any visitors without his permission.

South Carolina, besides thus minutely regulating the labor of negroes under contract, prohibited them from practising the "art, trade or business of an artisan, mechanic, or shop-keeper," or any other trade or business on their own account without paying an annual license fee to the district judge. And no negro could obtain a license who had not served a term of apprenticeship at the trade. Tennessee[1] also required licenses; and Mississippi required negroes to have written evidence of their home and employment.[2] Mississippi[3] also prohibited the renting or leasing of any land to negroes, except in incorporated towns and cities.

At the end of the war, when the relations between the races were strained, there must have existed in the minds of the white people a dread of personal violence at the hands of negroes, for some of the States forbade negroes having and carrying firearms or dirks or bowie-knives.[4] South Carolina allowed negro farmers to keep a shot-gun or rifle "such as is ordinarily used in hunting, but not a pistol, musket or other firearm or weapon appropriate for

[1]Laws of Tennessee, 1865, p. 23.
[2]Laws of Mississippi, 1866, p. 84.
[3]Laws of Mississippi, 1865, p. 82.
[4]Laws of Florida, 1865, p. 25; Laws of Mississippi, 1865, p. 165; Laws of South Carolina, 1865, p. 275.

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purposes of war." Out of this dread grew also the prohibition in Kentucky,[1] Mississippi,[2] and South Carolina,[3] of the sale of liquor to negroes. Strange to say, one of the very first acts passed by the legislature of Alabama in 1865,[4] was one repealing a former act which forbade the selling of liquor to negroes.

In the court-room there were legal distinctions on account of race in that negroes were not allowed to sit on juries.[5] Negroes were allowed to testify only in cases, civil and criminal, in which a negro was a party or would be directly affected by the decision.[6]

Only one State established separate courts for negroes, and that was South Carolina.[7] This court was known as the District Court, and sat monthly and quarterly to hear complaints by and against persons of color. It had exclusive jurisdiction, subject to appeal, in all civil cases where one or both of the parties were persons of color, and all criminal cases wherein the accused was a person of color, and also all cases of misdemeanor affecting the person or property of persons of color. The magistrate could try petty cases involving disputes between master and apprentice, master and servant, and the like. But when a white man was arraigned for the murder of a person of color, the case had to be taken before

[1]Laws of Kentucky, 1865–66, p. 68.

[2]Laws of Mississippi, 1865, p. 165.

[3]Laws of South Carolina, 1865, p. 275.

[4]Laws of Alabama, 1865, p. 55.

[5]Laws of Arkansas, 1866–67, p. 99; Laws of Mississippi, 1866–67, p. 233; Laws of Tennessee, 1865–66, p. 24; Laws of Texas, 1866, p. 131.

[6]Laws of Alabama, 1865–66, p. 98; Laws of Kentucky, 1865–66, p. 389; Laws of Mississippi, 1865, p. 83; Laws of Texas, 1866, p. 59; Laws of Virginia, 1865–66, pp. 89–90: Laws of South Carolina, 1865, p. 299.

[7]Laws of South Carolina, 1865, pp. 278–291.

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the regular Superior Court. In the matter of legal penalties, they were usually the same for both races. South Carolina alone inflicted somewhat severer punishments upon negroes in cases of rape, assault and theft.[1]

The movement of negroes from place to place was restricted by only two States, namely, Kentucky and South Carolina. Kentucky, in 1863, refused admission within her borders to any negro who claimed to be free under the Emancipation Proclamation.[2] And South Carolina, in 1865, required every negro migrating into the State to file a bond, within twenty days after his arrival, with two freeholders as sureties, in a penalty of one thousand dollars, conditioned upon his good behavior and for his support in case he should become unable to support himself. If he failed or refused to file this bond he might be taken to the borders of the State; and if he returned to the State within fifteen days he might be imprisoned for fifteen years.[3]

These, then, were the racial distinctions in Southern law arising more or less directly from the war. It may be well to notice in this connection that not all of these distinctions, arose out of ill-will between the races. Some of them were necessary. For instance, the laws regulating the marital relations of negroes and legitimatizing their children were in no sense discriminatory. Likewise, the laws with regard to apprentices and those requiring contracts to be written and read to the negroes were, on the whole, enacted to protect them. But this cannot be said of those laws which required negroes to have licenses to follow their vocations, to have written

[1]Laws of South Carolina, 1865, pp. 271, *et seq.*
[2]Laws of Kentucky, 1863, p. 366.
[3]Laws of South Carolina, 1865, p. 276.

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evidence of their homes and employment, and those prohibiting the renting of land to negroes; nor can it be said of those acts prohibiting negroes having firearms, those restricting their movement, and those prescribing a different court and different punishment. But good or bad, almost all laws which in any way distinguished between the races went almost at a blow when the State governments began to be reconstructed. For instance, at least twenty-five pages of the Laws of South Carolina, 1865-66, were devoted to acts referring almost exclusively to negroes. When the reconstructionists were through with them in 1867, all that was left was the provision against intermarriage of negroes and white persons.

We come now to those laws which separate the races in the home, at school, and in public conveyances—those prohibiting intermarriage, those requiring separate schools and those requiring separate railroad accommodations.

There is hardly one point upon which the Southern States are so unanimous as that there shall be no intermarriage between the races. Their determination is expressed both in their constitutions and in their codes. The prohibition is found in the Constitution of Georgia,[1] 1865; of Tennessee,[2] 1870; of North Carolina,[3] 1875; and of Mississippi,[4] 1890. These States also have statutory provisions prohibiting intermarriage. For instance, Florida[5] has three, and Mississippi,[6] North Carolina,[7] and Ten-

[1]Art. IV, sec. 1.
[2]Art. XI, sec. 14.
[3]Art. XIV, sec. 24.
[4]Art. XIV, sec. 263.
[5]Laws of Florida, 1865, p. 30; 1881, p. 86; 1903, p. 76.
[6]Laws of Mississippi, 1865, p. 82.
[7]Laws of North Carolina, 1871–72, p. 328.

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nessee[1] each have one statute to that effect; while Arkansas,[2] Kentucky,[3] Louisiana,[4] South Carolina,[5] and Virginia[6] seem not to have constitutional provisions against intermarriage, but have statutory provisions instead. The penalty for the violation of this prohibition varies from one year's imprisonment or a fine of five hundred dollars in South Carolina[7] to life imprisonment in Mississippi.[8] North Carolina alone has prohibited the intermarriage of negroes and Indians, and the prohibition applies only to Croatans.[9] Why this distinction? I believe that it is no trick of fancy to say that this State prohibited the intermarriage of Croatan Indians and negroes because she feared lest some of the blood of Virginia Dare's stock might flow through mulattoes' veins, and that the "milk white doe of Carolina's coast" might become spotted.

An equally universal principle in the Southern States is that the races must be educated in separate schools. This is provided for both in the constitutions and statutes. Two of the reconstruction constitutions, however (those of Louisiana,[10] 1868, and South Carolina,[11] 1868), provided that all public schools supported by the State should be open to all, without distinctions as to race or color. The Constitutions of Alabama,[12] 1867 and 1901; of Florida,[13]

[1]Laws of Tennessee, 1869–70, pp. 67-70.
[2]Laws of Arkansas, 1866–67, p. 99.
[3]Laws of Kentucky, 1865–66, p. 37.
[4]Laws of Louisiana, 1894, p. 63.
[5]Laws of South Carolina, 1865, p. 291, and 1879, p. 3.
[6]Laws of Virginia, 1877–78, pp. 302–303.
[7]Laws of South Carolina, 1879, p. 3.
[8]Laws of Mississippi, 1865, p. 82.
[9]Laws of North Carolina, 1887, p. 494.
[10]Title VII, Art. 135.
[11]Art. IX, sec. 10.
[12]Art. XII, sec. 1, and Art. XIV, sec. 256.
[13]Art. XII. sec. 12.

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1885; of Georgia,[1] 1868; of Louisiana,[2] 1898; of Mississippi,[3] 1890; of Missouri,[4] 1865 and 1875; of North Carolina,[5] 1875; of South Carolina,[6] 1895; of Tennessee,[7] 1870; of Texas[8] and of Virginia,[9] 1902, all require separate schools for the white and colored children. And nearly every one of these constitutional provisions has been reënforced by statutes to the same effect.[10] Louisiana seems to have had the most trouble in establishing separate public schools. In 1875, we find the law prohibiting any separation of the races in the A. and M. College of Louisiana.[11] It is not until 1880 that we have the first separate schools for negroes sanctioned by law.[12] It must be remembered that the reconstruction government lasted longer in this than in most of the other States.

The States have been somewhat chary of separating the races, by legal enactment, in private schools and colleges not supported by the State. Nevertheless, three have now taken the step. In 1895, Florida made it unlawful for any person or body of persons to teach colored and white children in the same class or building in any school,

[1]Sec. 187.
[2]Art. 248.
[3]Art. VIII, sec. 207.
[4]Art. IX, sec. 3, and Art. XI, sec. 3.
[5]Art. IX, sec. 2.
[6]Art. XI, sec. 7.
[7]Art. XI, sec. 12.
[8]Art. VII, sec. 7.
[9]Art. IX, sec. 140.
[10]Laws of Alabama, 1884–85, p. 349; Laws of Arkansas, 1886–87, p. 100; 1873, p. 423; Laws of Florida, 1895, pp. 96–97; Laws of Louisiana, 1880, pp. 110–111; Laws of Mississippi, 1878, p. 103; Laws of Missouri, 1864, p. 126 and 1889, p. 226; Laws of Tennessee, 1865–66, p. 65, 1873, p. 46, and 1901, p. 9; Laws of Texas, 1876, p. 201 and 1884, p. 40.
[11]Laws of Louisiana, 1875, pp. 50–52.
[12]Laws of Louisiana, 1880, p. 110.

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public or private, of any grade.[1] In 1901, Tennessee followed with a similar law.[2] And in 1904, Kentucky also prohibited the teaching together of white and colored children even in private schools and colleges.[3] However, she allows a private school to have a branch for pupils of the other race, provided it is not less than twenty-five miles distant. Out of the Kentucky law grew the Berea College controversy of last year.

There has been surprisingly little separate taxation of the polls and property of negroes for the support of their schools, the school fund usually being divided pro rata. Texas[4] did, in her constitution of 1866, provide that all the proceeds of a tax levied upon negroes should go to the support of their schools. Kentucky is honey-combed with the principle of separate taxation. In 1865-66, she provided that all taxes arising from the property and polls of negroes should go to the support of their schools and paupers.[5] Then she adopted the principle of local separate taxation, by which the negroes were taxed for the support of the schools in their communities.[6] In 1873-74, Kentucky required the school fund for colored schools to come entirely from the taxation of colored people.[7] And local separate taxation lived on[8] until 1904, when the State[9] provided for a system of graded schools in cities of the fourth class, which are to be kept up partly by special taxes;

[1]Laws of Florida, 1895, pp. 96–97.
[2]Laws of Tennessee, 1901, p. 9.
[3]Laws of Kentucky, 1904, pp. 181–182.
[4]Art. X, sec. 10.
[5]Laws of Kentucky, 1865–66, p. 51.
[6]Laws of Kentucky, 1873, pp. 509, 238, 193–194, 554–555.
[7]Laws of Kentucky, 1873–74, pp. 63–66.
[8]Laws of Kentucky, 1879–80, I, pp. 257–258; 1885–86, pp. 877–891; 1887–88, I, pp 192 and 203, II, p. 474.
[9]Laws of Kentucky, 1904, pp. 129–131.

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but "no tax raised from the property or poll of any white persons or corporation in said city shall be used for the said graded free colored common schools, nor shall any tax raised from the property or poll of any colored person be used for the support of any said graded free white common schools of said city."

Perhaps the most interesting group of racial distinctions are those known as the "Jim Crow Laws." Of course, this is not their official title, but it is an inseparable nickname. The principle of separation of the races on railroads had its prototype as early as 1865. In that year, both Florida[1] and Mississippi[2] made it unlawful for negroes to intrude into any railroad car set apart for the use of white persons. The next year, 1866, Texas required all passenger trains to have a car for the "special accommodation of freedmen."[3] But in the seventies, during the reconstruction régime, two of the States (Texas[4] and Louisiana[5]) made it unlawful to make any distinctions in public conveyances on account of race or color.

The modern "Jim Crow Laws" may be said to have been begun by Tennessee in 1881.[6] That State stood alone until 1887, when, during the next four or five years, there came a veritable shower of "Jim Crow Laws," consisting of those of Florida,[7] Mississippi,[8] Texas,[9] Louisiana, Alabama,[10] Kentucky,[11] and Arkansas.[12] Then

[1]Laws of Florida, 1865, p. 25.
[2]Laws of Mississippi, 1865, pp. 231–232.
[3]Laws of Texas, 1866, p. 97.
[4]Laws of Texas, 1871, 2d sess., p. 16
[5]Laws of Louisiana, 1873, pp. 756–757.
[6]Laws of Tennessee, 1881, pp. 211–212 and 1885, pp. 124–125.
[7]Laws of Florida, 1887, p. 116.
[8]Laws of Mississippi, 1888, p. 48.
[9]Laws of Texas, 1889, pp. 132–133 and 1891, p. 220.
[10]Laws of Alabama, 1891, p. 412.
[11]Laws of Kentucky, 1891, pp. 63–64.
[12]Laws of Arkansas, 1891, pp. 15–17 and 1893, pp. 200–201.

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came a lull until 1898-99, when the other States followed. They were South Carolina,[1] North Carolina,[2] Virginia,[3] and Maryland.[4] So that, at present, Missouri is the only Southern State which has not separated the races in public conveyances. Virginia, however, repealed her "Jim Crow Law" on March 15, 1904.

These laws are practically the same in all of the States. They require that all railroads carrying passengers for hire in the State shall furnish separate accommodations for colored and white passengers, that separate accommodations mean either separate coaches or compartments of the same coach separated by substantial partitions, that these coaches or compartments shall be equal in comfort and convenience, that colored passengers shall not ride in coaches or compartments set apart for white passengers, and vice versa. These provisions do not apply to trains doing interstate business, for that would interfere with the power of Congress to regulate commerce. Therefore, Georgia is the only State to separate the white and colored passengers on sleepers.[5] Neither do the provisions apply to nurses in the employ of members of the other race, nor to officers in charge of prisoners or lunatics, nor to such prisoners and lunatics, nor to railroad employees. They do not apply to narrow-gauge roads, nor to freight trains hauling passengers in caboose cars.

A separation of the races is required on steamboats in North Carolina,[6] South Carolina,[7] and Virginia.[8] These

[1]Laws of South Carolina, 1898, pp. 777–778 and 1903, p. 84 and 1904, pp. 438–439.
[2]Laws of North Carolina, 1899, pp. 539–540.
[3]Laws of Virginia, 1899–1900, pp. 236–237 and 1901, pp. 183–184.
[4]Laws of Maryland, 1904, pp. 187–188.
[5]Laws of Georgia, 1899, pp. 66–67.
[6]Laws of North Carolina, 1899, pp. 539–540.
[7]Laws of South Carolina, 1904, pp. 438–439.
[8]Laws of Virginia, 1889–1900, pp. 340–341 and 1901, pp. 329–330.

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provisions, of course, can apply only to those steamboats plying in waters wholly within the jurisdiction of the respective States.

Only three States—Arkansas,[1] Mississippi,[2] and Louisiana[3]—require separate waiting rooms at railroad depots. But the railroads, of their own will and accord it seems, have provided these in a number of the States.

Street cars have not been generally included in these "Jim Crow Laws." However, Louisiana took the initial step in 1902, and passed a general law requiring a separation of the races on street cars. Tennessee followed the next year with a law requiring separate street car accommodations in counties with a population of over a hundred and fifty thousand.[4] This, I think, applied only to Memphis. This year, she made the law general.[5] South Carolina[6] requires separate accommodations on all electric railways operated outside the corporate limits of towns and cities. Virginia is the only State to undertake local legislation on this subject.[7] She, in 1900, required a separation of the white and colored passengers on street cars operating between Richmond and Seven Pines, and between the city of Alexandria, and points in the counties of Fairfax and Alexandria.

Still another set of racial distinctions is those which require the separation of colored and white paupers, lunatics, convicts, and other State dependents. They prohibit the chaining together of white and colored convicts, also their sleeping together; though there is no distinction

[1]Laws of Arkansas, 1893, p. 200.
[2]Laws of Mississippi, 1888, p. 45.
[3]Laws of Louisiana, 1894, pp. 133–134.
[4]Laws of Louisiana, 1902, p. 89.
[5]Laws of Tennessee, 1903, p. 75 and 1905, pp. 321–322.
[6]Laws of South Carolina, 1905, p. 954.
[7]Laws of Virginia, 1901, pp. 212–213 and 639–640.

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as to the nature of their work. This separation of the State dependents is accomplished in most of the States not so much by general laws to that effect as by providing separate asylums, and so forth, for the races. And when the State makes provision for a colored asylum or poor-house, we may safely infer that no colored lunatic or pauper is allowed in an asylum or poor-house for white patients.

The most recent racial distinction is that of Georgia, in August of this year, by which all the colored troops of that State are permanently retired from the military service of the State.[1]

Such are the racial distinctions in Southern law, so far as the letter of the law is concerned. There are other laws which do really distinguish between the races, but they are so worded that they cannot properly be included in this discussion. There are still others which, though general in terms, apply particularly to negroes, not because of their race or color but because of other, it seems permanent, characteristics of theirs. For instance, the present vagrancy laws in most of the Southern States were aimed directly at the negroes because of their indolence and thriftlessness. There are laws in nearly all of the Southern States which grow cotton, prohibiting the sale of cotton in less quantities than a bale between the hours of sunset and sunrise. Every one who has had experience on a cotton farm knows that the aim of this legislation is to meet the habit of the negroes to hide cotton in the fence-corners and bushes during the day to bag off to some neighboring store under the cover of night.

[1]Laws of Alabama, 1875, p. 285 and 1884–85, p. 192; Laws of Arkansas, 1903, p. 161; Laws of Georgia, 1890–91, p. 213.

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It is significant that Georgia[1] and Kentucky[2] have made chicken-stealing a felony.

The racial distinctions are before us. We have seen that those distinctions which existed during the first years after emancipation, those regulating the relations of the master and his colored apprentice, of the employer and his colored laborer, those which restricted the movement of negroes, those which restricted their right to testify and to sit on juries, those which prescribed a different court and different punishment for negroes—all have been repealed or become inoperative. On the other hand, those laws which prohibit intermarriage, those which separate the races in the schools, those which require separate coaches for colored and white passengers have become more definite and more nearly universal throughout the South. Political and judicial distinctions have been disappearing; social distinctions have been and are being more clearly defined. The legislators have been vigilant in their efforts to prevent any sort of social associations between the races. This principle reaches from the pauper and convict to the college and university student and professor. Impelled by a fear that some legislature might try to legislate social equality between the races, Georgia[3] has in the Bill of Rights of two of her constitutions (that of 1868 and that of 1877), the somewhat unique provision: "The social status of the citizen shall never be the subject of legislation."

What relation does the foregoing bear to the discussion of suffrage in the South? Simply this: the suffrage clauses have lent themselves to racial distinctions, especially by

[1]Laws of Georgia, 1905, p. 166.
[2]Laws of Kentucky, 1904, p. 83.
[3]1868, Art. I, sec. 11; 1877, Art. II, sec. 1.

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their "grandfather" and "understanding" provisions. The former are temporary provisions, the last, that of North Carolina, expiring in 1908. The "understanding" clause is permanent only in Mississippi. These are political distinctions. The sign of the times, judged in the light of the last forty years, is that all political distinctions between the races will disappear. Therefore, suffrage discriminations will depart from the stage with the rest of their companions. But the educational and property tests will remain, because they are not racial distinctions. We may expect that the negro with intelligence enough to read the constitution of his State, with thrift enough to acquire a fair amount of property, and with State pride enough to pay his taxes will be allowed to vote as readily as will the white man with similar qualifications. But in matters social we may expect the races to drift further and further apart. Social association is based upon something deeper and broader than statutory enactments. All that the written law need do, all that it has tried to do, is to separate the races wherever and whenever there is danger of friction and thus conduce to harmony between the black people and the white people of the South.

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AN INDEX OF COMPARATIVE LEGISLATION

W. F. Dodd

For several years the plan of publishing an annual index or summary of foreign legislation has been under discussion among American students of political science. The Librarian of Congress has recommended that such a publication be undertaken by the United States Government, and it seems possible that his efforts in this direction may finally be successful. Information concerning foreign legislation is now difficult to obtain, and the usefulness of a publication that would make more easily available the substance of current foreign laws is well recognized.

The demand for information of foreign legislation may be said to come from three sources: (1) From practicing lawyers who handle cases involving the laws of other countries. The increasing American investments abroad and the closer social relations which have developed between the United States and foreign countries make it necessary that our lawyers should know something of the legal institutions of other nations. In our great seaboard cities lawyers have already begun to devote themselves to foreign law as a specialty, and important legal firms find it necessary to have foreign connections. (2) Our legislators are beginning to look more closely into the experiences of other countries. Statesmen are coming to see that one country may well prove a laboratory for others in the field of social legislation, and to wish to profit by foreign successes and to avoid foreign failures. Germany has gone very far in the matter of governmental insurance and in legislation for the protection of labor, and it is within these fields that we may expect future legislation in the United

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States. Foreign experience has been many times appealed to in the recent discussion of railway rate regulation. The Torrens system of land registration has been borrowed almost as a whole by several of our States. (3) The field of comparative legislation has until recently been an almost unexplored one to students of political science in the United States, but they are now awake to the importance of a study of the legal institutions of other countries. The present need of the lawyer, of the legislator and of the student may be said to combine in the demand for some means of keeping informed of the current legislation of foreign countries.

As a preliminary to plans for a comprehensive index of world legislation, it may be well to review carefully what is now being done to make available to the student and to the legislator the laws of the various countries. Several publications attempt to summarize the current legislation of all countries. Each of these will be briefly reviewed.

The *Annuaire de Législation Étrangère*, issued by the French *Société de Législation Comparée*, is the oldest and best known publication in this field. It attempts to cover all countries but actually confines itself principally to the German and Latin countries of Continental Europe. The legislation of the British Colonies, of the United States, and of the countries of South and Central America is very inadequately treated. The legislative activities of each country for the year are reviewed, and full texts of the most important laws are published. The reviews of foreign legislation and translations of texts are prepared by resident members or foreign correspondents of the Society; the reviews are arranged by countries, but there is a brief subject index to each volume. The laws are usually printed within the year after the date of their

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passage, but many times a longer delay occurs. The *Annuaire de Législation Française* and the *Bulletin Mensuel* of the Society supplement the *Annuaire de Législation Étrangère,* and the three publications furnish a fairly good review of world legislation.

The *Jahrbuch der Internationalen Vereinigung für Vergleichende Rechtswissenschaft und Volkswirtschaftslehre* does not attempt to publish texts of laws, and its reviews cover economic as well as legal matters. Although it attempts to review the legislation of all countries, it actually summarizes best the laws of the European countries, and hardly touches the British colonies and Spanish American republics; its treatment of Great Britain and the United States is slight, but its reviews of the legislation of the Slavic countries are superior to those of any other publication. The summaries and discussions of economic and legislative movements are prepared in most cases by foreign members of the *Vereinigung;* the articles are printed under the names of the respective authors without other editing than that of translation into German. Thus the arrangement of matter is by countries, and the publication has no index. Political and economic movements are rather fully discussed; the synopses of laws are usually full enough to indicate the contents of current legislation; the reviews of legal and economic literature are good. In the *Jahrbuch* are also published addresses and articles within the field of comparative legislation. The value of this publication is diminished by the delay in issuing the annual volumes; that for 1899 appeared in 1902 and in several cases reviewed legislation of 1898.

The *Anuario de Legislación Universal,* and the publication of which it is a supplement, are unique in that they attempt to publish texts not only of current legislation but

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also of all existing statutory law. A private undertaking, without the foreign connections of a learned society, these publications are a striking illustration of what may be done in the field of comparative legislation. The *Colección de las Instituciones Políticas y Jurídicas de los Pueblos Modernos* gives full texts in Spanish of the codes and principal laws in force in the countries of Europe. A second series, of which only two volumes have been published, will give similar texts for all countries of North and South America. The *Anuario de Legislación Universal* was begun in 1895 under the title of *Complemento* of the *Colección*, the first volumes covering the years 1893 and 1894. Two annual volumes have been issued since that time; one prints new laws and codes of American countries; the other, new laws and codes of European countries. The American volumes treat very fully the Latin American countries, but almost entirely neglect the United States and Canada. The European volumes are very good for the most important countries of Continental Europe, Portugal, and the smaller states of Southeastern Europe, but Great Britain is inadequately treated, and the British Colonies are hardly touched. Since 1897 the current Spanish laws have been separately printed in the *Anuario de Legislación y jurisprudencia Españolas*. In the *Anuario de Legislación Universal* the matter is arranged by countries. Slight subject indexes in recent volumes make the texts fairly accessible but not easily so. Texts of codes and laws are published in full in practically all cases. The volumes do not appear promptly; those for 1898 appeared in 1899 and 1900, and the American volume for 1902 appeared in 1904. The *Revista de legislación Universal*, edited by the management of the *Anuario*, publishes brief notes of current legislation of all countries.

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Of the three publications which avowedly attempt to cover the field of world legislation, two print the texts of laws and one reviews the contents of important legal enactments. None of these publications appears promptly enough to keep legislators informed of contemporary enactments, and none so completely reviews the legislation of all countries as to make its use satisfactory. In fact, the examination of all three publications fails to reveal information regarding much important legislation. Yet each is fairly thorough in its treatment of certain groups of countries.

The *Journal of the Society of Comparative Legislation* has an annual summary of British legislation which covers the colonies very thoroughly. Beginning with 1901 it has also published reviews of the legislation of several of the most important foreign countries. The colonial laws are summarized from the published texts by members of the Society residing in England. The summary is arranged by colonies, territorially grouped; a brief introduction indicates the most important legislation of the year, and a good subject index makes available all subjects reviewed under each colony. The annual review of legislation appears in one of the numbers of the *Journal* within the year after the year reviewed; more promptly than any of the attempted reviews of world legislation. The *Journal* also publishes articles upon subjects of comparative, colonial and foreign law.

The New York State Library's legislative bulletins are too well known to need much comment. Begun in 1891 with a slight summary of the State legislation of 1890, the undertaking has now expanded into three annual bulletins: *Comparative Summary and Index, Review of Legislation,* and *Digest of Governors' Messages.* The texts of Ameri-

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can State laws are obtained as soon as issued, and summarized by a paid staff at the New York State Library; the prompt issue of the *Summary and Index* is thus made possible. In the more recent issues of this bulletin the laws have been fully summarized; the earlier summaries were so slight as to make the bulletin almost useless except as an index to the texts. The summary itself is arranged by subjects arbitrarily classified; a full subject index makes it possible to find all laws upon a given subject. The *Summary and Index* is indispensable to one who wishes to trace the legislative development of the American States during the past fifteen years.

Many important fields of comparative legislation are covered by government publications or by private undertakings. Several publications print current tariff laws. The *International Union for the Publication of Customs Tariffs* was formed by a convention of July 5, 1890, for the publication, at common expense, of tariff laws and their modifications.[1] A bureau was created at Brussels for the translation and publication of tariff laws. The *Bulletin International des douanes* appears in five languages, English, French, German, Italian and Spanish; it has not fulfilled its purpose of printing promptly and accurately the texts of tariff laws; the tariffs of some South American countries have been printed after they had ceased to be in force, and the English translations are bad. The *Annales du Commerce Extérieur*, published monthly by the French Ministry of Commerce, has been continuously issued since 1843. It gives the texts, in French, of the tariff laws of all countries. The *Bollettino di legislazione e statistica doganale e commerciale*, published by the Italian Ministry of Finance since 1883, does in Italian what the *Annales*

[1]Martens: Nouveau Recueil des traités, 2d series, XVI, 532, 535.

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du Commerce Extérieur does in French, but it prints also other laws of commercial interest. Since 1904 English translations of the most important tariffs have appeared in the *Monthly Summary of Commerce and Finance*, issued by the United States Bureau of Statistics.

The field of internal taxation is covered by two official publications: The *Bulletin de statistique et de législation comparée*, a monthly bulletin of the French Ministry of Finance; and the *Bollettino di statistica e di legislazione comparata*, published bi-monthly by the Italian Ministry of Finance. The French bulletin prints the texts of the most important foreign laws upon financial subjects; in its reviews of foreign financial movements it devotes especial attention to monetary and budgetary legislation. The Italian bulletin prints some foreign laws and publishes studies in comparative legislation upon financial and related subjects.

The general field of commercial law has been very well covered in German by the private collection of Borchardt, of which a new edition has been recently announced.[1] In the *Zeitschrift für das gesammte Handelsrecht* and the *Annales de droit commercial* appear reviews of current commercial legislation of important countries. The *Legislativer Teil* of the *Oesterreichisches Wirtschaftspolitisches Archiv*, issued monthly by the Austrian Ministry of Commerce, prints texts of important Austrian and foreign laws relating to patents, tariffs, railways, shipping and manufactures.

The excellent *Annuaire de la législation du travail* of the

[1]Sammlung der geltenden Wechsel-und Handelsgesetzes aller Länder, Berlin, 1871, 2 bde.; Sammlung dem seit dem Jahre 1871 publicirten Wechselsgesetze, Berlin, 1883; Die geltende Handelsgesetze des Erdballs, Berlin, 1884–87, 5 bde.; Nachtrag, 1–4, Berlin, 1893–97; Die geltende Handelsgesetze des Erdballs, Hrsg. von Kohler, Meyer, Dove, 3d ed. 1906.

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Belgian *Office du Travail* publishes with a fair degree of promptness the laws of all countries relating to labor. The *Bulletin de l'Office international du travail* (printed also in German as *Bulletin des Internationalen Arbeitsamts*) was begun in 1902 as the organ of the central office of the International Association for Labor Legislation. An English issue of the *Bulletin* is to be undertaken as soon as sufficient financial support can be obtained. The *Bulletin* prints promptly the texts or summaries of labor laws and regulations of all countries; each number is preceded by a summary of important legislation, and contains a careful bibliography. The *Bulletin du Comité permanent of the Congrès international des accidents du travail et des assurances sociales* gives the text of legislation relating to accidents to labor and labor insurance, and also publishes articles, notes of legislation and reviews of important books. The collections of Bellom and Zacher make available in French and German the texts of laws relating to labor insurance;[1] supplements to both collections have kept them well up to date.

The *Bulletin des Transports internationaux par chemins de fer* (*Zeitschrift für den internationalen Eisenbahntransport*) is published monthly by the *Office Central des transports internationaux des chemins de fer* at Berne. An annex to each number gives French and German texts of the railway laws and regulations of the countries which were parties to the Berne Convention of 1890 for the international regulation of railway transportation. Many of the laws do not appear as promptly as could be desired. In the text of the *Bulletin* are printed important decrees and judicial decisions affecting railways. The *Archiv für Eisenbahnwesen*, issued bi-monthly by the Prussian

[1]Bellom: Les lois d'assurance ouvrière à l'étranger. Paris, 1892. Zacher: Die Arbeiterversicherung im Auslande. Berlin, 1898.

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Ministry of Public Works, has a section devoted to legislation, and prints texts or summaries of the important railway laws of other countries. Although the laws are in most cases printed promptly, the Mexican railway law of 1899 did not appear until 1904.

The fields of literary and industrial property have also been very well covered. The *Bureau de l'Union internationale pour la protection des oeuvres littéraires et artistiques* has published a collection of treaties and conventions concerning literary and artistic property;[1] and *Le Droit d'Auteur*, its official publication, prints with a fair degree of promptness the texts of current treaties and laws relating to intellectual property. The collections of Lyon-Caen and Delalain, and of Röthlisberger make available the laws of all countries.[2] The *Bureau International de l' Union pour la protection de la propriété industrielle* has issued an excellent collection of laws and treaties concerning industrial property,[3] and its organ, *La Propriété industrielle*, prints current laws, administrative regulations, and judicial decisions in this field. The *Annuaire de la propriété industrielle* reviews the legislation and judicial decisions of important countries concerning industrial property. The collection of patent laws by Gareis and Osterrieth contains all legislation in this field from 1871 to the present time,[4] and the recently announced collection by Kohler will make available the laws now in force.[5]

[1]Recueil des conventions et traités concernant la propriété littéraire et artistique. Berne, 1904.

[2]Lyon-Caen et Delalain: Lois françaises et étrangères sur la propriété littéraire et artistique. 2 vols. Paris. Supplement, Paris, 1896. Röthlisberger Gesetze über das Urheberrecht in allen Länden. 2d ed. Leipzig, 1902.

[3]Recueil général de la législation et des traités concernant la propriété industrielle. 4 v. Berne, 1896–1901.

[4]Gareis und Osterrieth: Patentgesetzgebung. Bde. 1–12, Berlin, 1879–1904.

[5]Kohler, J. Patentgesetze aller Völker. Berlin, 1905.

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In Criminal law the *Zeitschrift fur die gesammte Strafrechtswissenschaft,* with its German translations of criminal codes of all countries, covers the field fairly well. The *Mitteilungen der internationalen kriminalistischen Vereinigung* contains important discussions of penal legislation. The translations of codes in the *Colección de las instituciones politicas y juridicos* have already been mentioned; the French translations of codes made under the direction of the *Société* and *Comité de législation étrangère* are also of great importance to students of comparative legislation.

The texts of treaties and of other international documents are issued with reasonable promptness in numerous publications.[1] The *Institut Colonial International* of Brussels has published collections of laws in force in the various colonies on land systems, labor, colonial functionaries, mining, railroads and tariffs. Judicial decisions in the more important branches of the law are covered by Clunet's *Journal de droit International privé,* the *Revue de droit International privé,* and the *Zeitschrift für internationales Privat- und Oeffentliches Recht,* although the two latter periodicals confine themselves principally to France and Germany, respectively.

After this brief review of existing publications it will be well to inquire what are the problems involved in the proposed index of world legislation. Of greatest importance is the question of coördinating the current legislation which is indexed with the laws already in force in the various countries. The Spanish publication has indicated one method, that of printing in full texts of codes and important laws in force in all countries, but

[1]Of these the most important are Marten's Nouveau Recueil des Traités, Archives Diplomatiques, and das Staatsarchiv; the Recueil international des traités du xx^{e} Siècle, edited by Descamps and Renault, also promises to be of great value.

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such an undertaking would be impossible, and if possible, unsatisfactory.

As a preliminary to the main question it is necessary to discover what laws are in force in each legislative jurisdiction. A careful survey must be made of codes, legislative enactments, customary law, and subordinate legislation (administrative ordinances, etc.) in force in every country. The efforts of the English Society of Comparative Legislation are of interest in this connection. This society submitted to each British Colony a list of questions covering its (1) common law, (2) statute law, (3) method of legislation, (4) publication of statutes, (5) revision of statutes, (6) indexes to statute law, (7) consolidation and codification, (8) subordinate legislation—rules and orders, regulations, ordinances, etc.[1] With a definite knowledge of the laws in force in any jurisdiction it will be practicable to indicate the previous state of the law upon the various subjects by brief notes to the index of current legislation. To be most effective the index of legislation must indicate the legal setting of every new enactment, and the later treatises by which others may be made familiar with the actual situation. The summary itself would thus be a combination of index and bibliography. For the better use of the summary it should be preceded by a brief review of the most important world legislation of the year.

Turning now to the questions more intimately concerning the construction of the summary, we may consider (1) How fully should the laws be summarized? (2) What shall be the arrangement of matter in the summary? (3) What shall be done with regard to foreign technical terms which have no English equivalents?

(1) In handling the laws, three plans have been followed

[1]Journal of the Society of Comparative Legislation, 1901, p. 264.

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by existing publications; printing of the text itself, full summary, and brief index entry. The publication of the texts of all public laws is impossible, and is neither necessary nor desirable if all laws are collected at some one place within easy reach of, and available for use by, those desiring the full contents of any enactment. A brief entry would often be insufficient to indicate the purpose of the law. A rather full but not minute summary seems to be necessary to render such an index a real guide to the laws, and to make the publication useful to those who may wish to follow the trend of world legislation. Several of the existing publications have their reviews of legislation prepared by correspondents in the several countries, but to obtain uniformity of treatment and promptness of publication, it is necessary that the work of indexing should be done in some one place.

(2) The summary of laws might be arranged by countries or by subjects; the latter arrangement would be better adapted to practical use. But if a subject arrangement is agreed upon the question still remains whether there should be several great headings with all others classified within them, or whether a more purely alphabetical arrangement should be followed. The American lawyer hardly expects to find "marriage and divorce" under "civil law," and the publication must conform somewhat to the habits of its constituency. An alphabetical arrangement similar to the American Digest Classification Scheme would be necessary. If the publication were to be adapted to foreign as well as to American use, it would be possible to introduce cross-references from foreign technical terms, *e.g.*, "Arbeiterversicherung, *see* Insurance, sub-head Labor Insurance." If the summary is arranged by subjects, with sufficient cross-refer-

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ences, the duty of an index to the summary would be to collect references to all laws of any country; the legislation of all countries upon any subject may be easily found in the summary itself; the index must make it possible to find as easily all the laws of any one country.

(3) In examining such a book as Wertheim's *Worterbuch des englischen Rechts* one is impressed with the fact that there are many English technical terms which have no German equivalents; so also are there many French and German technical terms which have no English equivalents. "A mortgage is not the equivalent of an *Hypothèque*; the *société en commandite* does not exist in England;" a partnership in English law has no exact counterpart in the countries of the civil law."[1] Yet the systems of legal terminology reduce themselves to two, that of the civil law, and that of the common law, and any difficulties would seem to be obviated by (1) cross-references in the summary from foreign terms for which no English equivalent exists, (2) translation of such terms into the nearest English equivalents, with the foreign technical term in parenthesis in the text, *e. g.*, if *Kommanditgesellschaft* were translated as "limited partnership" the text would appear: "Limited partnership (Kommanditgesellschaft);" if this translation were determined upon it would serve also for the French *Société en commandite*, for the Italian *Societá in accomandita*, and for the Spanish *Compañia en comandita*.

As has been indicated, there is certain work which must be done before a comprehensive index of world-legislation can be undertaken with any hope of success; and this work is of such a character that it should be undertaken were no such index in contemplation: (1) A careful survey must

[1]Journal of the Society of Comparative Legislation, 1897, iv-vi.

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be made of the laws in force in every legislative jurisdiction. In this matter the English Society has set the example. (2) The accumulation in one place of complete sets of laws, court reports and codes of all countries; and of the leading treatises upon the principal branches of the law of each country. (3) A careful subject catalogue of this material, so that the existing legislation in any country may be easily found. Only when this preliminary work is done will it be possible to undertake a comprehensive summary of comparative legislation.

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NOTES ON CURRENT LEGISLATION[1]

DR. ROBERT H. WHITTEN

The year 1906 is an off year in State legislation. Only six States have annual sessions and of the forty-one States having biennial sessions all but eight hold their sessions in the odd-numbered years. Regular annual sessions were held in Georgia, Massachusetts, New Jersey, New York, Rhode Island, and South Carolina; regular biennial sessions in Iowa, Kentucky, Louisiana, Maryland, Mississippi, Ohio, Virginia,[2] and Vermont. Special sessions have also been held in California, Delaware, Illinois, Kentucky, Pennsylvania, and Texas. In California the legislature was called in extra session to enact emergency measures necessitated by the San Francisco earthquake and fire. In Delaware the legislature was convened in special session to elect a United States senator, an agreement having been reached between the party factions that had caused the deadlock at the 1905 session. The special sessions in Illinois and Texas were called to correct defects in the primary laws. In Kentucky the governor called the legislature back in extraordinary session immediately upon the adjournment of the regular session to pass an act taxing rectifiers and blenders of distilled spirits. He said in his message: "A powerful interest, present with its astute and capable representatives, has been able for a week or more to block all legislation upon the important question of your revenue affairs, and as chief executive I give you this opportunity to determine whether or not this industry shall bear its just proportion of the burden of taxation." An act was accordingly passed placing a tax of $1\frac{1}{4}$ cents per gallon on rectified or adulterated distilled spirits. Governor Pennypacker, of Pennsylvania, summoned the legislature in extra session in January, 1906, for the express purpose of turning to account in constructive legislation the reform

[1] In subsequent numbers of the REVIEW the legislation of foreign countries, particularly Great Britain, Canada and Australia, will receive more extended treatment.

[2] To October 1, 1906.

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wave then at its height. He says: "A wave of popular and political unrest and commotion has spread over the land and left its impress in our own Commonwealth as well as elsewhere. Such upheavals, to whatever causes they may be due, are to be regarded not as disasters, but as opportunities. It is at such times that much can be accomplished by wise legislators to enhance the public weal."

The record of the ensuing short special session bears convincing proof of the governor's wisdom in selecting the psychological moment for progressive legislation.

And not only in Pennsylvania but in other States it was found that the legislature which in former years had stood like adamant against all demands for reform, left an admirable record of achievement in the interest of the general welfare. The national congress, too, which has seldom been able to grapple with more than one big measure a year, was suddenly imbued with unwonted activity and has left a record of constructive and progressive legislation, probably never before equaled by that body. It is interesting to speculate as to what might have been the total result if the governor of each State had followed the example of Governor Pennypacker in summoning the legislature in extra session and submitting to it a definite program of reform. But the reform tide is apparently still at flood and with most of the legislatures meeting in January of 1907, we may confidently look forward to a strenuous legislative year. Forty-one States and Territories, including Porto Rico, will hold regular sessions during 1907.

Constitutions. The people of Michigan voted in April to hold a constitutional convention. The legislature which meets in January will provide for the election of delegates. The present Constitution was adopted in 1850 and several previous attempts to secure a constitutional convention have failed. Maryland will vote in November, 1907, on the question of a convention to revise the Constitution ('06, ch. 786). An amendment to the Oregon Constitution was proposed by the initiative petition and adopted June 4, 1906, which requires resolutions providing for the calling of a constitutional convention to be submitted to the vote of the people and also changes the procedure for the adoption of constitutional amendments by doing away with the necessity of referring an amendment to a succeeding legislature prior to its submission to the people. This shortens the process by two years. An amendment may now be proposed by the

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legislature and submitted to the people at the next general election or at a special election held for the purpose; or it may be proposed by initiative petition and submitted to vote without recourse to the legislature. A majority of the votes cast on the amendment are sufficient for its adoption. A more expeditious method of amendment could scarcely be devised.

One and possibly two new States will come into the Union through the passage by congress of an enabling act for the admission as one State of Oklahoma and Indian Territory and of Arizona and New Mexico ('05–'06, ch. 234).

The even years, though off years as to legislative sessions, are the reverse as to the submission to the people of constitutional amendments, as most States have their biennial general elections in November of the even years. About fifty amendments will be voted on at the November elections of 1906.

STATUTES. Mississippi has adopted a complete revision of its general laws ('06, ch. 101). The new code is to be printed by October 1, 1906. Revision commissions have been appointed in Ohio ('06, p. 221) and Rhode Island ('06, ch. 1363). Dr. G. W. Scott, law librarian of the Library of Congress, has been authorized to prepare an index to the Statutes at Large and to "prepare such other indexes, digests and compilations of law as may be required for congress and other official use." $5840 is appropriated. Governor Warfield of Maryland recommended that means be provided "by which expert information can be collected for the use of the members of the legislature * * * thus enabling them to keep track of effective legislation in other States and communities."

CIVIL SERVICE. The legislature of Pennsylvania, though failing to pass a State civil service law, as recommended by Governor Pennypacker, passed an act applying to Philadelphia only ('06, ch. 18). The act provides for the appointment by the mayor of three commissioners, not more than two of whom may be of the same political party. The examination for employment as laborers "shall relate to their capacity for labor, their habits of sobriety and industry, and their experience in the kind of work for which they apply." The probationary period is three months. No clerk or employee in either the competitive or the non-competitive class may be removed or reduced in pay or position except for just cause, stated in writing and to which he shall have been given opportunity to make written answer. Veterans of any war of the United States, their widows and children are

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entirely exempt from the provisions of the law. The idea of giving special preference to the children of veterans is a rather startling innovation. A supplementary act makes it a misdemeanor for an officer or employee to solicit or receive contributions for political purposes ('06, ch. 6). Governor Herrick, of Ohio, recommended the adoption of the merit system and Governor Montague, of Virginia, recommended its application to the treasury department and to employees in the insane hospitals and the penitentiary.

One of the important acts of congress was that providing for the reorganization of the consular service ('05-'06, ch. 83).

LOBBYING. New York has passed an act ('06, ch. 321) providing for the registration of legislative counsel and agents and for a statement of payments made to them by the person or corporation in whose interest they act. This law is based on the earlier laws of Massachusetts (1890), Wisconsin (1899), and Maryland (1900). The "docket of legislative appearances" is kept by the Secretary of State. Counsel and agents must register before acting as such and must state the name of their employer and give a brief description of the legislation in reference to which they are employed. Within two months of the adjournment of the legislature it is the duty of every person or corporation incurring any expense directly or indirectly in connection with legislation to file a detailed statement of the same including the names of the payees and the amount paid to each. A possible loophole has already been made evident in this latter provision by the filing of several statements stating merely that the agent employed had not yet rendered his bill. Compensation contingent on the passage or defeat of any legislative measure is prohibited. It is provided that the act shall not be construed to apply to professional services in drafting bills, or in advising clients, or in rendering opinions as to the construction and effect of proposed legislation. The act does not go to the extent of the Wisconsin law which by an amendment of 1905 (ch. 472) makes it unlawful for any legislative counsel or agent to attempt to influence any legislator personally and directly otherwise than by appearing before the regular committees, or by newspaper publications, or by public addresses, or by written or printed statements, arguments, or briefs delivered to each member and twenty-five copies first deposited with the Secretary of State.[1]

[1]For a brief digest of State and foreign laws and decisions relating to lobbying, see Wisconsin Legislative Reference Department, Comparative Legislation Bulletin No 2, *Lobbying* by Margaret A. Schaffner.

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In New Jersey a special House committee on lobbying, of which Everett Colby was chairman, submitted a report[1] recommending the enactment of a lobby law similar to those of Massachusetts, Wisconsin, and Maryland. The committee also states that the lobby evils can be diminished by the enactment of a corrupt practice act and by the adoption of a semi-judicial procedure in the consideration of bills affecting corporate interests and privileges. President Roosevelt, in his message, said that there should be both State and national laws forbidding the use of money by corporations in connection with legislation save for "the employment of counsel in a public manner for distinctly legal services."

DIRECT LEGISLATION. Oregon is the first State to put the initiative and referendum to practical test. At the general election in June, 1904, and again in 1906, most important measures were legislated upon directly by the people. In 1904 a direct nomination law and a local option liquor law were adopted on initiative petition, and in 1906 eleven propositions were submitted to the people, one on the referendum petition and ten on the initiative petition. In the case of the referendum vote the action of the legislature was sustained and of the ten measures submitted by the initiative three were rejected and seven adopted. One of the measures adopted was found to be defective, doubtless fatally, in that it was minus an enacting clause. Five of the measures submitted were constitutional amendments. One of the amendments adopted extends the direct legislation system by providing that the referendum may be demanded on any item, section, or part of an act, and by giving to the legal voters of every municipality and district the right to exercise the initiative and referendum as to the affairs of their respective localities even to the extent of vetoing any special act passed by the State legislature. This amendment was adopted by a vote of 47,678 to 16,735. Seattle, Washington, has adopted the recall by a vote of 9312 to 1271. On petition of 25 per cent of the voters a special election will be held to decide whether a designated elective official shall continue in office or shall be replaced by another more acceptable to a majority of the voters.

NATURALIZATION. In accordance with the recommendations of the Naturalization Commission, Congress passed an act ('05–'06, ch.

[1]Report of committee appointed to investigate Rules and Regulations Affecting the Privileges of Lobbyists. 50 pp. Trenton, N. J., 1906.

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338), "To establish a bureau of immigration and naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States." Jurisdiction to naturalize aliens is restricted to United States courts and State courts having jurisdiction in civil actions in which the amount in controversy is unlimited.

ELECTIONS. Kentucky ('06, ch. 55) has submitted to vote in November, 1907, a constitutional amendment providing as a qualification for voting the payment of all taxes due for the previous year, at least 60 days prior to the election. In Oregon a constitutional amendment providing for woman suffrage was proposed by the initiative petition and defeated at the polls, June 4, 1906. The vote was 36,902 for, to 47,075 against. The same question had been voted on twice before in Oregon, once in 1884 and again in 1900. In 1884 the vote was 11,223 in favor, to 28,176 against; in 1900 it was 26,265 in favor, to 28,402 against.[1]

The provision in the Ohio election law to discourage endorsements and fusion by providing that the name of a candidate nominated by two or more parties could appear but once on the ballot, has been repealed ('06, p. 176).

Rhode Island has revised its laws relating to voting machines ('06, ch. 1349). The law contemplates the purchase of machines by the the State for use in State elections. It also empowers cities and towns to purchase or lease machines.

The people of Pennsylvania have long been attempting to secure the enactment of a personal registration law to correct flagrant election abuses in the large cities. After long effort they secured the submission by the legislature and the adoption of a constitutional amendment in 1901 permitting the passage of special laws regulating registration in the various classes of cities. Though the adoption of this amendment was an unmistakable indication of the desire of the people for a personal registration law, the legislatures of 1901, 1903, and 1905 refused to pass such a law. The special session summoned under the influence of the reform wave, however, quickly passed laws requiring and regulating personal registration in cities of the first three classes ('06, ch. 12, 13).

CORRUPT PRACTICES. Pennsylvania ('06, ch. 17) and New York ('06, ch, 502, 503) enacted advanced corrupt practices acts. New

[1] *Independent*, July 26, 1906, p. 198.

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York was the first State to require candidates to file a statement of expenditures, having passed a law of this character in 1890. The fact that the law failed to define legitimate expenditures, required no statement from political committees, and provided no means of auditing the statement submitted, rendered it practically useless. The new law aims to correct these defects. The candidate or any other individual may directly incur only certain strictly limited personal expenditures. All other expenditures must be made through a candidate's authorized agent or through the treasurer of a political committee. The treasurer of each political committee receiving or disbursing *more than $200* must file a detailed statement of receipts and disbursements. Such statement in each case must include "the amount received, the name of the person or committee from whom received, the date of its receipt, the amount of every expenditure or disbursement *exceeding $10*, the name of the person or committee to whom it was made, and the date thereof; and unless such expenditure or disbursement shall have been made to another political committee, it shall state clearly the purpose of such expenditure or disbursement." The Association for the Prevention of Corrupt Practices at Elections strongly opposed the exemptions, as shown by the italics above, claiming that they made a complete farce of the law. Provision is made for a judicial inquest to determine the sufficiency and correctness of the statements filed, and a fine of $1000 or imprisonment for one year or both may be imposed. The Pennsylvania act contains similar provisions. The exemption allowed is not so large as in New York, the act applying to all committees whose receipts or disbursements exceed $50, instead of $200 as is the case in New York. Moreover, all disbursements must be reported, though vouchers need not accompany amounts of $10 or under. The act also prohibits the disbursement of any money received from an anonymous source. The laws of both New York and Pennsylvania limit quite strictly the purposes for which expenditures may be made. The New York law forbids contributions to campaign funds by candidates for judicial office, this provision being due to the scandal arising from the practical sale in many instances of judicial nominations at enormous prices. The Pennsylvania act and in New York a supplemental act ('06, ch. 239) prohibit contributions from corporations. While the New York act ('06, ch. 503) specifically legalizes disbursements for "the pay of newspapers for advertisements, pictures, reading matter and addi-

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tional circulation," a New Jersey law ('06, ch. 208) takes quite the opposite stand. The New Jersey act in defining the crime of bribery makes it include: "The payment for the insertion in any newspaper or magazine of any article tending to influence any voter; provided, however, that this prohibition shall not be construed to prohibit the insertion of paid advertisements, which advertisements shall be indicated by the words 'This advertisement has been paid for by ———' (inserting the name of the person or persons paying for the same)." New Jersey following the recommendation of Governor Stokes has provided as a penalty for giving or taking a bribe, disfranchisement for five years. A witness testifying, though himself the giver or taker of the bribe, is granted immunity ('06, ch. 206).

The governors of Maryland, New Jersey and Ohio recommended the enactment of corrupt practices acts, but without result; and Governor Guild's recommendation for a thorough revision and strengthening of the Massachusetts act met a like fate.

PRIMARY ELECTIONS. Political parties in certain counties of Pennsylvania have long experimented with the direct nomination system. In Crawford county it has been used by the Republican party for more than forty years. Now the system has been made compulsory and universal ('06, ch. 10). The conduct of the primaries throughout the State, moreover, has been taken out of the hands of the parties. Hereafter the primaries of all parties will be held on the same day, at the same place, and under the control of the regular election officials. Congressmen, members of the legislature, county and city officials and other officers, except State, borough and township officers, are nominated at the primaries. Delegates to State and national conventions are also directly elected in the same manner. Candidates for nomination are placed on the ballot by petition. A separate official ballot is provided for each party. A voter may ask for the ballot of any party but if challenged must swear that "at the next preceding general election at which he voted, he voted for a majority of the candidates of the party for whose ballot he asks."

In Illinois the general primary law of 1905 was declared unconstitutional (People *v.* Election Commissioners, 77 N. E., 321) and Governor Deneen summoned the legislature in extra session to enact a new measure. The new act (approved May 23, 1906) is uniform for the entire State. Primaries are held for all parties at the same place and time under the supervision of the regular election officers. At this

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primary delegates are elected to State, congressional, senatorial, county, municipal, and other conventions, and candidates for nomination are voted upon, for all elective State and county offices and for all municipal offices to be filled at the November election. Opportunity is also afforded for ascertaining the sentiment of the voters in the respective parties upon candidates for United States senator, such expression of course to have no binding effect upon the legislature. An official primary ballot for each party is furnished at public expense, containing in alphabetic order under each office names of all candidates for nomination. Separate delegate ballots are furnished at private expense for each list of delegates desirous of representing a particular party. A qualified voter may receive the primary and delegate ballot of any party, but if challenged must swear that he is a member of and affiliated with the party, and that he has not voted at a primary of any other political party within a year. A day is prescribed for the holding of each kind of convention, uniform throughout the State. County conventions must be held the first Thursday after the election; senatorial conventions the second Tuesday (except in certain cases the first Thursday); congressional conventions the second Thursday; State conventions the third Tuesday. This uniformity does away with "snap conventions" and numerous opportunities for machine manipulation and sharp practice.

Any candidate for nomination to any State, congressional, or senatorial office who receives a plurality of the votes cast in any delegate district shall have cast for him the votes of the delegates from such district for at least the first ballot. There is no provision whatever in the law as to how votes cast at the primaries for county and municipal officers shall be counted in the convention. Nominations are made by majority vote of the delegates elected to each convention.

Governor Pattison, of Ohio, recommended that attendance and voting at the primary election be made a qualification for voting at the following general election. Direct nominations were advocated, but without result, by the governors of Iowa, Maryland, and Ohio. Governor LaFollette, of Wisconsin, recommended an amendment of the direct nomination law so as to provide for the expression of the voter's second choice in cases where there are more than two candidates and thus correct the evil of plurality nominations. The bill introduced to carry into effect this recommendation was not passed.

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BALLOTS. The Wisconsin act of 1905, submitting the question of the use of the pocket ballot and coupon voting system, was rejected by the people at the election held in April, 1906. Bills providing for ballot reform and the abolition of the present provision for voting a straight ticket without making a cross after the name of each candidate, failed to come to a vote in the New York legislature. In Iowa, however, the party circle was abolished and the voter will hereafter have to place a mark opposite the name of each candidate for whom he desires to vote ('06, ch. 44).

TAXATION. New York has created a special commission of fifteen members to investigate the subject of taxation. Hon. Warner Miller is chairman and Prof. Edwin R. A. Seligman is a member of the commission. The commission will report to the legislature of 1907. After but a year's trial New York has repeal edits annual tax of one-half of one per cent on mortgages and substituted a recording tax at the same rate ('06, ch. 532). The Allied Real Estate Interests organized a powerful opposition to the annual tax. The first repeal bill was vetoed by the governor, and the amended bill, passed by a two-thirds majority, was signed by the governor because of the fact that he considered this second passage practically equivalent to its passage over his veto. The annual tax of one-half of one per cent was similar in principle to the Pennsylvania four mill tax on mortgages and money at interest. Aside from New York, Alabama is the only State that has the recording tax system, having adopted it in 1903, the rate being fifteen cents on the hundred dollars of mortgage valuation.

New Jersey has provided for greatly increased central control over the valuation of property for taxation ('06, ch. 120). The governor is to appoint a county board of taxation consisting of three members for each county. This board is to be a board of "equalization, revision, review and enforcement" of taxes. It is to supervise and control the work of the assessors and, subject to the approval of the State Board of Equalization, to prescribe rules and regulations for their government. The County Board serves also as a board of appeal from which appeal may in turn be taken to the State Board. Members of the County Board may be removed by the governor for cause. An assessor failing to comply with the law may on complaint of a county board be removed by the State Board.

Quebec passed an act ('05, ch. 15) taxing stock transfers which was

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approved just a month after the approval of the New York stock transfer tax act ('05, ch. 241). The Quebec act has now been revised ('06, ch. 12). The New York act, owing to the great activity in the stock market, has proved a great success as a revenue measure, yielding during the first year $6,233,498.58.

In accordance with the recommendation of Governor Pattison, the Ohio legislature repealed the act passed in 1904 (p. 398), levying a tax of 2 per cent on inheritances passing to direct heirs. The collateral inheritance tax of 5 per cent enacted in 1893 is still in force. A direct inheritance tax varying from 1 to 5 per cent according to the entire amount of property left had been passed in 1894, but was declared unconstitutional in 1895. Kentucky ('06, ch. 22, art. 19) passed a law levying a collateral inheritance tax of 5 per cent with a $500 exemption. The Quebec inheritance tax has been revised ('06, ch. 11). The rate of the tax varies from 1 per cent to 15 per cent increasing according (1) to remoteness of relationship, (2) to total amount of estate, (3) to amount passing to one person.

In New Jersey the advocates of "equal taxation" as applied to railroad property have been victorious. The system of taxation adopted, while complex, aims to secure the taxation of the entire property of the railroad at approximately the same rate paid by real estate generally. Hitherto a tax at the rate of one-half of one per cent had been levied by the State Board of Assessors on the total value of real and personal property including the franchise. This State tax was supplemented by a tax for local purposes but assessed by the State Board on branch roadbeds and real property other than that included in the "main stem," *i. e.*, the right of way not exceeding 100 feet in width. The rate of this tax was the same as the local rate on other property, but not more than 1 per cent. Under the new law ('06, ch. 280) the 1 per cent restriction is removed and the assessment is to be made by the local assessors instead of by the State Board. Another act ('06, ch. 82) provides for the assessment of all other property of the railroad (main stem, personalty, and franchise) by the State Board of Assessors at the average rate of taxation throughout the State.

New Jersey has also provided for an annual increase in the rate of the gross receipts tax on street railways from the present rate of 2 per cent to a maximum of 5 per cent ('06, ch. 290). In Oregon laws were proposed by initiative petition and adopted in June, 1906, levying a 3 per cent gross receipt tax on sleeping cars, refrigerator cars, oil and

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express companies, and a like tax at the rate of 2 per cent on telegraph and telephone companies. These laws were adopted by an overwhelming vote.

In Maryland the percentage taxes on the gross receipts of all kinds of public service corporations have been materially increased ('06, ch. 712).

The California legislature of 1905 provided for the appointment of a special commission on revenue and taxation. The commission consists of Governor Pardee, chairman, two senators, two assemblymen, and Prof. Carl C. Plehn, of the University of California, who was appointed as the tax expert and secretary of the commission.

The commission has recently made a preliminary report and will make a final report to the legislature of 1907. The commission has made a thorough study of the tax laws of all the States and has compiled statistics relating to the California tax system. The commission strongly recommends the separation of State and local taxation, and in order to accomplish this result it recommends the levying of certain new taxes on corporations. The taxes recommended are as follows:

1. A gross earnings tax on railroads, street railroads, express companies, car companies, light, heat and power companies, telegraph and telephone companies, at rates fixed for a period of ten years by constitutional enactment after which time they may be amended by the legislature, but not more frequently than once every six years. This tax is to be in lieu of all other taxes except taxes on property not necessarily used in the operations conducted by the companies.

2. A tax on shares of capital stock of all banks at 1 per cent of the book value of the stock. The book value is the sum of the paid up capital and the accumulated surplus and undivided profits. This is in lieu of all other taxes except taxes on real estate, the assessed value of which, however, is to be deducted from the capital before the 1 per cent rate is applied.

3. A tax at the rate of 1 per cent on the assessed value of all corporate franchises of every sort not covered by the above mentioned taxes, such franchises to be valued by the State Board of Equalization. This tax also is to be in lieu of local taxes on such franchises.

The commission strongly favors the gross earnings tax as a method of taxing public service corporations. It says, "Taxation according to gross earnings is simple and easy of administration. It is almost automatic in its operation, being the application of a mathematical

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rule and not calling for the exercise of wide discretionary powers on the part of any officials. It is certain to yield a steady, increasing revenue. It adjusts itself to the ability of the company to pay the tax, being measured by the fund out of which it is paid. Taxation absolutely just and perfect is only a dream. Taxation on gross earnings as a method for taxing railroads comes as close to perfect equity as any system that can be devised."

The commission maintains that the percentage of gross receipts that should be charged is not a matter of guess work, but a matter that can be determined with great accuracy. The rates should be fixed in the first instance by determining what percentage of the gross earnings will normally equal 1 per cent of the full cash value of the corporate holdings, as 1 per cent of the full cash value is deemed a fair rate on real estate and other property on the tax rolls. Statistics for the determination of a fair rate have been carefully compiled and as a result the commission has determined on certain minimum and maximum percentages for the taxation of each class of public service corporations. These rates are as follows:

	Minimum.	Maximum.
Railroads	4%	6%
Street railroads	6	8
Car companies	4	6
Express companies	2½	5
Telegraph and telephone companies	4	4
Light, heat and power companies	5	6½

The commission states that after further investigation it hopes to make a more definite recommendation as to the exact rate to be charged. It says, "The rates are matters which can be determined with almost mathematical accuracy. They should not be fixed by guess work, sentiment or prejudice."

RACING. Kentucky has provided for the creation of a State racing commission, with power to regulate races and to license racing associations. This law is based on a similar New York law, an important difference, however, being that the New York act provides also for a gross receipts tax on racing associations.

RACE PREJUDICE. Kentucky passed an act ('06, ch. 59) popularly known as the "anti-Uncle Tom's Cabin law." The act makes it unlawful to present any play that is based upon antagonism alleged formerly to exist between master and slave, or that excites race prejudice."

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POLICE. The law relating to the Providence police board has been amended ('06, ch. 1379) so as to provide for the appointment of the commissioners by the mayor and aldermen instead of by the governor. The police board of Newport, however, is still to be appointed by the governor ('06, ch. 1391).

LIQUOR. The Ohio local option law of 1904, giving residence districts of municipalities the right to decide by vote whether liquor shall be sold, was on the recommendation of Governor Pattison so amended as to allow such districts to prohibit the sale of liquor on the filing and verification of a petition signed by a majority of the voters of the proposed district ('06, p. 68). The petition feature was in the 1904 bill as introduced and was greatly desired by the advocates of the bill. Similar bills have been introduced and strongly pressed for passage by the anti-saloon forces in New York and other States, but as yet without success.

Ohio increased its retail liquor tax from $350 to $1000. This tax is uniform throughout the State. The Chicago city council in March, 1906, doubled the saloon license fee, making the rate $1000 instead of $500. In Philadelphia the rate is $1100, in New York $1200, and in Boston $500 to $2000.

New York amended its liquor law with a view to abolishing the fake hotels that have been established to evade the Sunday closing law ('06, ch. 183).

SUNDAY OBSERVANCE. In France and in Canada laws have been enacted providing for Sunday rest. The French law, according to an account in the *Independent* for July 26, provides that wherever the complete closing of an establishment on Sunday would be prejudicial to the interest of the public, the weekly rest may be given for part or all of the year in one of the following ways: (1) on some other day of the week for the whole personnel of the establishment, (2) from Sunday noon to Monday noon, (3) Sunday afternoon with a compensatory holiday by rotation every fortnight, or (4) by shifts in rotation of part or all the employees. These exceptions can only be made by direct authorization of the government. The day of rest by rotation (4) is permitted only to the following establishments: hotels and restaurants; shops for sale of tobacco and fresh flowers; hospitals, asylums and drug stores; baths; newspapers, museums, theaters and libraries; water works, gas works and power plants; transportation other than railroads; and industries dealing with perishable material

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or products. In the case of public works of urgent nature, such as the prevention or repairs of accidents, the weekly day of rest may be suspended for the workmen needed. Railroads and steamships are provided for in another law. The Canadian law as summarized by the *Daily Consular Reports* provides that no person shall sell, or offer for sale, or purchase any goods, chattels, or other property, or transact any business on the Sabbath day. Persons may do acts of mercy and attend to religious work, receive and transmit telegraph and telephone messages, and do certain necessary work, and even move trains and vessels and transport passengers on the Sabbath. But no employee is to work on Sunday unless allowed twenty-four hours' rest in the next six days. Games, meetings, etc., are not allowed where a fee is charged. One provision states that "no Sunday newspaper can be brought in for sale on Sunday."

PUBLIC HEALTH. Ohio and New Jersey have provided that the State Board of Health may hold an annual conference of local health officers to which delegates shall be sent by the localities (Ohio '06, p. 205; N. J. '06, ch. 131). Similar conferences or institutes are now held in New Hampshire, Indiana, New York, and Vermont.

The provisions of the pure food law enacted by congress are too well known to require extended notice ('05-'06, ch. 384). The act is designed to prevent "the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors." Proprietary medicines must bear a label, stating the quantity or proportion of "any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloralhydrate, or acetanilid." Massachusetts has passed an act ('06, ch. 386) forbidding the sale of preparations containing cocaine or alpha or beta eucaine except on the prescription of a physician, dentist or veterinary surgeon, and requiring the labeling of preparations containing opium, morphine, heroin or chloralhydrate, or containing alcohol in amount larger than required for use as a solvent or preservative. Maryland has revised its law of 1904 prohibiting the sale of cocaine, morphine, etc., except on prescription ('06, ch. 523).

Iowa passed a general pure food law (06, ch. 166).

The meat inspection law passed by Congress was inserted as an amendment to the appropriation bill for the Department of Agriculture ('05-'06, ch. 382.) The Secretary of Agriculture is given full power to inspect the preparation of meat and meat products intended

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for interstate or foreign commerce. "No person, firm or corporation shall transport or offer for transportation and no carrier of interstate or foreign commerce shall transport or receive for transportation. . . any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined and marked as 'inspected and passed.'" Three million dollars are appropriated to carry out the purposes of the act.

Massachusetts ('06, ch. 165) and Virginia ('06, ch. 302) have provided a penalty for spitting on sidewalks or on the floors of public buildings, public halls, stations, boats or cars. This is a subject that has usually been regulated by municipal ordinance, only few States having general statutes on the subject.

The national quarantine law was one of the important measures of the recent congress ('05-'06, ch. 243). Congress has also created a board for the condemnation of unsanitary buildings in the District of Columbia ('05-'06, ch. 138).

Mosquitoes. New Jersey has taken up the mosquito problem in a determined and energetic manner. By an expenditure of $350,000 it is planned to clear the entire shore line of the mosquito breeding areas said to be responsible for 90 per cent of the mosquitoes of the State ('06, ch. 134). The law of 1906 is based on the knowledge secured from a systematic survey of the State to determine the feasibility of lessening the mosquito pest. New York also passed an act ('06, ch. 583) empowering local boards of health to order the removal of mosquito breeding areas and providing for the assessment of the cost on property benefited.

Fires. Kentucky has provided for the investigation of fires by a State fire marshal and by certain local officials ('06, ch. 95). Local officers making investigations report to the State fire marshal. The fire marshal is appointed by the State Insurance Commissioner. New Jersey has passed an act permitting the appointment of an inspector of combustibles and fire risks in cities of the first class ('06, ch. 249).

Niagara Falls. The New York legislature repealed the charters of four Niagara power companies that had failed as yet to exercise their franchise ('06, ch. 266-69).

Congress passed an act ('05-'06, ch. 367) assuming entire control over the diversion of water from the Niagara river within New York State. By its terms corporations then diverting water were com-

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pelled to obtain permits from the Secretary of War to continue such diversion. Permits must also be obtained for the transmission of power from Canada into the United States.

CORRUPT COMMISSIONS. Virginia has passed an act to prohibit the corrupt influencing of agents, employees, and servants ('06, ch. 260). Penalties are provided against the giving or acceptance of a commission or gratuity when the same is made with the intent of influencing the agent in regard to purchases, sales, contracts, etc. Massachusetts passed the first law on this subject in 1904 and in 1905 similar laws were passed by Connecticut, Michigan, New York, Rhode Island, Washington, and Wisconsin.

TRUSTS. According to a newspaper account the new Australian foreign commerce act contains radical provisions designed "to counteract the tactics of the American harvester and other trusts." The governor-general is authorized after investigation to prohibit or regulate the importation of goods offered for sale in unfair competition with any Australian goods.

Ohio broadened the immunity provision for witnesses in trust prosecutions ('06, p. 313).

Kentucky has passed an act ('06, ch. 117) permitting persons to combine or pool their crops of wheat, tobacco, and other products, while the Supreme Court of Montana has recently declared unconstitutional the anti-trust law of that State because of its exemption of persons engaged in horticulture and agriculture (State *v.* Cudahy Packing Company, 82 P. 833).

The prevention of the crushing of the small companies by unfair competition is aimed at in an Iowa law ('06, ch. 169). This act provides that petroleum or its products may not be sold in one part of the State at a higher rate than in another, due allowance being made for difference in cost of transportation.

RAILROADS. The passage of the Rate Bill by Congress was the most important and vigorously contested single piece of legislation enacted during the year ('05–'06, ch. 337). Its provisions are too well known to call for further comment.

Ohio reduced the maximum passenger rate from three cents to two cents a mile ('06, p. 4). Virginia passed an act empowering and requiring the State Corporation Commission "to fix and prescribe a schedule of rates for the transportation of passengers by all transportation companies" ('06, ch. 256). Until such a schedule shall be fixed

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the act requires railroads to issue mileage books at the rate of two cents a mile. Maryland also requires the issue of mileage books at the two cent rate ('06, ch. 174). A similar proposal in Iowa failed of adoption.

Massachusetts authorized the Board of Railroad Commissioners to require the use of block or other signals for safeguarding public travel ('06, ch. 267).

Iowa enacted an anti-pass bill, prohibiting passes to public officials, party officials, delegates to conventions, and candidates for public office ('06, ch. 90).

TELEGRAPH AND TELEPHONE. Massachusetts has placed telegraph and telephone companies under the supervision of the State Highway Commission and has given the commission power to regulate rates and service ('06, ch. 433).

BANKING. Kentucky has prohibited the business of private banking ('06, ch. 44). The act is apparently induced by an opinion of the Court of Appeals in regard to the equal taxation of banks, incorporation being deemed necessary to secure such equality. Massachusetts has abolished its Board of Savings Banks Commissioners and substituted a State Bank Commissioner ('06, ch. 204). The title of the abolished board was a misnomer as it had supervision over all kinds of banking institutions.

South Carolina has created the office of bank examiner ('06, ch. 64). Recommendations by the governors of Kentucky, Mississippi, and Ohio for State inspection and examination of banks were without result. New York has required trust companies to keep a reserve fund equal to 15 per cent of the amount of deposits ('06, ch. 337). New Jersey has passed a general savings bank act ('06, ch. 195). Governor Pattison, of Ohio, recommended that every officer or director of a bank be required to take oath that he will not engage in any kind of speculation whatsoever.

Virginia has passed a law for the regulation of pawnbrokers ('06, ch. 156). They are required to obtain a license, pay a fee of $100 therefor, and give bond for $1000. Specified fees are permitted for investigating the security or title and closing the loan; in addition to such fee only the legal rate of interest can be charged.

LABOR. Authorized by a constitutional amendment adopted in November, 1905, the New York legislature passed an act ('06, ch. 506) restoring the requirement for the eight-hour day and the prevailing

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rate of wages on municipal works which had been held unconstitutional by the courts. The State free employment bureau in New York City having practically failed to accomplish the purpose for which it was established, was abolished ('06, ch. 158). In Massachusetts, on the other hand, the chief of the Bureau of Statistics of Labor was directed to establish free employment offices in certain cities ('06, ch. 435). Maryland has limited the hours of telegraph operators engaged in blocking trains to eight hours a day ('06, ch. 454).

CORRECTIONS. New Jersey ('06, ch. 79) has been added to the list of States, now four in number, that have substituted electrocution for hanging in the infliction of the death penalty. New York adopted this method in 1888, Ohio in 1896, and Massachusetts in 1898.

Ohio has abolished the contract system of employing convicts and will employ them in the making of products for the use of the State and local governments and their various institutions ('06, p. 177). Convicts may also be employed in the preparation of all kinds of road material to be furnished to the political divisions at cost. A special commission appointed by the governor in 1900 made a report in November, 1900, recommending that while convicts should be employed primarily in the production of goods for public use, any excess beyond the needs of the State should be sold in the open market. This commission also recommended that power machinery be abolished and that goods be made by hand.

South Carolina has created a board of pardons to consider such petitions for pardons or commutation of sentences as may be referred to them by the governor ('06, ch. 13). The governor is not bound by their recommendation but in case he does not follow it he must submit his reasons to the general assembly.

CHARITIES. Kentucky has established a State board of control for charitable institutions and abolished the former managing boards of the State insane hospitals and of the feeble-minded institutions ('06, ch. 18). Massachusetts has passed an act to provide for industrial training and employment for the adult blind. A State commission for the blind is created ('06, ch. 385).

CHILDREN.[1] The laws looking toward the welfare of children may be roughly grouped under school attendance, juvenile probation and child employment.

[1] Contributed by Helen Page Bates, Ph.D.

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School Attendance: Massachusetts ('06, ch. 383) has taken a step of great significance both to educational development and child employment in defining clearly the mental training necessary as a prerequisite for employment. Several States have required as a test, ability to read and write "simple English." Massachusetts goes farther and construes "simple English" to mean ability to enter the second grade of the public schools in 1906, the third grade in 1907 and the fourth in 1908. Provision has also been made ('06, ch. 502) for a comprehensive system of medical inspection in every city and town, formerly maintained in a few cities only by the local health boards. Scholars showing signs of illness or returning after absence from unknown cause are to be examined at once. Tests for defective sight and hearing are to be taken regularly by teachers, and courses of instruction and practice as to the best methods of testing are to be introduced into normal schools. The District of Columbia (U.S., '05–'06, ch. 203) has now a compulsory school attendance law for children 8 to 14; habitual truants are to be sent to special schools; the law is to be enforced by truant officers aided by child labor inspectors and probation officers. Maryland in 1904 made education of deaf children compulsory from 8 to 16. The law ('06, ch. 236) now requires the education of both blind and deaf from 6 to 16. There is also provision for a school census of defective children. New Brunswick ('06, ch. 13) has enacted a compulsory school law, subject to adoption by local option similar to laws in effect in Nova Scotia and Manitoba.

Juvenile Probation: The system of juvenile courts and probation has made decided advance by the enactment of original laws in District of Columbia, Kentucky and Massachusetts. Maryland ('06, ch. 807) has appointed a commission to investigate and revise the laws relating to the care of minors, particularly delinquents. The Kentucky law ('06, ch. 64) gives exclusive jurisdiction of children's cases to the county courts; there is provision for both chief and assistant probation officers, also for detention schools modeled after that of Denver, in counties containing cities of first or second class; penalties are prescribed for adults contributing to the dependency or delinquency of children. The Massa husetts law relating to delinquent children follows in the main the Colorado statutes; the court procedure is worked out with special care to avoid any color of criminal proceedings; while the State Board of Charities is given supervision of the system. The Boston juvenile court ('06, ch. 489) starts out well

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equipped with a justice, special justices and clerks appointed by the governor and council, with power vested in the justice to appoint both paid and unpaid probation officers. The court is to have exclusive jurisdiction of all cases of delinquent and wayward children in the city. The juvenile court judge of the District of Columbia (U. S., '05-'06, ch. 56) is appointed by the president and senate for a 6 year term with power to select 2 probation officers. The jurisdiction given to the court is extensive, covering violations of United States laws and ordinances of District of Columbia, cases of truancy and of adult delinquency. No commitments hereafter are to be made to any juvenile institution receiving public aid unless dependency or delinquency is first determined by the court. The Michigan juvenile court act ('05, ch. 312) has been held unconstitutional as to its administration in certain counties. (Hunt *v.* Wayne, 105 N.W. 531, Dec., 1905.) Steps, however, have already been taken to remedy this in the next legislature.

In general there is a tendency to raise the age limit of minors coming under jurisdiction of the courts and to make needed provision for detention homes and schools.

Child Employment: Six of the thirteen States holding regular legislative sessions in 1906 enacted laws relating to child labor. Georgia after a fiercely contested battle passed a law August 1. As industrial leader of the South, action taken here, is of import as aiding or furthering advance in other competing Southern States. Protection is extended only to factory children, and the age limit is low, only 10 years, but it is to be raised to 12 in 1907, while night work is to be prohibited in 1908 and an educational test imposed. The Iowa law ('06, ch. 103) gives protection to children in many occupations, following the average age limit and the average number of hours work but the method of enforcement seems decentralized. Kentucky ('06, ch. 52) revises the act of 1902 (ch. 16); the age limit is 14; night work is prohibited; work in canneries and in preparing of tobacco is excepted. Maryland's new law ('06, ch. 192) is an effective revision of that of 1894 (ch. 317). The age limit is 12 in all industries, canneries excluded; the issue of employment certificates is definitely prescribed and enforcement looked out for by appointment of six inspectors and an $8000 annual appropriation. Massachusetts' law of 1904, imposing a license tax on Boston bootblacks and peddlers, is extended to minors of all cities ('06, ch. 151) and the school

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committees empowered to regulate these small industries, frequently made an occasion for truancy and begging. New York ('06, ch. 375) debars children under 16 from mines and quarries. Night work in factories formerly allowed till 9 is now prohibited after 7 p. m. ('06, ch. 490); the same statute marks a signal victory in that, in Buffalo and New York, where previously a child might work till 10 p. m. in stores, offices, restaurants, apartment houses or in messenger service, work is now prohibited after 7 o'clock.

EDUCATION. Wisconsin has appointed a joint legislative committee to investigate the University of Wisconsin. Ohio has passed an act defining the policy of the State as to the development of the various higher educational institutions of the State ('06, p. 309).

Massachusetts has provided that the State Board of Education shall conduct a free teachers' employment bureau ('06, ch. 399). Ohio has fixed the minimum salary of school teachers at $40 a month ('06, p. 200). Governor Guild, of Massachusetts, recommended the passage of an act for the general medical inspection of school children. To carry out this recommendation a law was enacted ('06, ch. 502) requiring every city and town to appoint one or more school physicians. Congress passed an act fixing the salaries of teachers in the District of Columbia ('05–'06, ch. 254).

Virginia has authorized the establishment of high schools or joint high schools in any district or districts, and has appropriated $50,000 annually in State aid to such schools. Any district appropriating $250 or more for a high school, meeting the standards prescribed by the State Board of Education, may receive from the State fund an equal amount but not exceeding $400 ('06, ch. 211).

Ohio besides increasing the penalties for hazing has made it a misdemeanor for any teacher, superintendent or other person in charge of an educational institution to knowingly permit any act of hazing ('06, p. 124). Congress has also passed an act ('05–'06, ch. 87) regulating hazing at the United States Naval Academy.

MUNICIPAL GOVERNMENT. In Oregon, by a constitutional amendment proposed by initiative petition and adopted by the people, June 4, 1906, the legal voters of every city and town are "granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State." And it is further provided that "the legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town."

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The Pennsylvania legislature restored to the mayor of Philadelphia the right to appoint and remove heads of departments ('06, ch. 19).

Ohio enacted a county salary law ('06, p. 89), and New Jersey fixed the salaries of surrogate, register of deeds, county clerk, and sheriff in counties other than those of the first class ('06, ch. 53).

New Jersey provided for a gradual reduction of the local tax rate to one and three-fourths per cent ('06, ch. 116).

Virginia empowered councils of cities and towns to create officers and appoint or authorize the appointment of officers and employees in addition to those expressly authorized by the city or town charter ('06, ch. 24). This will give the councils a much needed control over the municipal administrative organization and will lessen the demand for special charter legislation.

MUNICIPAL UTILITIES. Governor Stokes, of New Jersey, recommended State supervision over the issue of shares of stocks and bonds by public service corporations and an act carrying out this recommendation was enacted. New Jersey also passed an act to enable cities to construct and operate municipal light, heat and power plants ('06, ch. 323). Another act of the same State ('06, ch. 36) provides that franchises may be granted for forty years, but if for more than twenty years the ordinance must he submitted to popular vote.

Massachusetts passed an act ('06, ch. 422) which is subject to the acceptance of the Boston Consolidated Gas Company, fixing a standard price and a sliding scale to be charged for gas by the company. Shortly after the decision of the New York State Gas and Electricity Commission reducing the price of gas in New York City to eighty cents a thousand, an act was passed by the legislature fixing the price at eighty cents ('06, ch. 125). The Consolidated Gas Company has secured an injunction against the enforcement of the reduced rate pending a final decision as to the constitutionality of the act.

The supervision of the New York water supply commission has been extended to water companies ('06, ch. 415).

New York City has been authorized to spend $2,500,000 in the establishment of a seaside park ('06, ch. 456). New Jersey has authorized cities of the first class to expend $10,000 for establishing and maintaining fresh air camps and recreation piers.

ROADS. Virginia has created a State highway commission ('06, ch. 73) and also a State convict road force ('06, ch. 74). The high-

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way commission is composed of a State highway commissioner, appointed by the governor, and of the professors of engineering in the University of Virginia, Virginia Military Institute, and Virginia Agricultural and Mechanical College and Polytechnic Institute. The commissioner must he a "civil engineer well versed in road building."

All prisoners sentenced to hard labor on the public roads or imprisoned in jail may on requisition of the superintendent of the State penitentiary be detailed to the State convict labor force.

Whenever the local road authorities of any county desire permanently to improve any main traveled road they may apply to the State highway commissioner for his approval of their project. If he approve and they agree to the construction of the road in accord with his plans, he may make requisition on the superintendent of the penitentiary for a sufficient number of convicts to build the road. The convicts remain under the supervision of the superintendent and the road is constructed under the supervision of an engineer employed by the highway commissioner. Materials, tools, teams, etc., are furnished by the local authorities. In case the local road authorities prefer to build the road by contract convicts may be furnished to the contractor.

Laws for the regulation of motor vehicles have been passed or amended in New York ('06, ch. 128), New Jersey ('06, ch. 113), Massachusetts ('06, ch. 353 and 412), Quebec ('06, ch. 13), South Carolina ('06, ch. 55), and Virginia ('06, ch. 299).

Ohio has authorized municipalities to have streets and roads treated with oil for the purpose of laying dust and preserving the roadbed ('06, p. 50).

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NEWS AND NOTES

Personal and Miscellaneous[1]

The third annual meeting of the American Political Science Association will be held at Providence, Rhode Island, December 26–29. The American Historical Association, the American Economic Association, the American Sociological Society and the American Bibliographical Society will hold their annual meetings at Providence at the same time. A preliminary program of the Political Science meeting will be sent out about November 15.

Émile Boutmy, the well-known French publicist and founder of the École Libre des Sciences Politiques, died in the early part of the year. He was the author of a work on the English Constitution and also two volumes, entitled, respectively, "*Éssai d'une Psychologie Politique du Peuple Anglais*" (Paris, 1901) and "*Éléments d'une Psychologie Politique du Peuple Americain*" (Paris, 1902).

The International Bureau of American Republics is publishing *American Constitutions* (three volumes), being a "compilation of the political constitutions of the independent nations of the new world." The work is edited by José Ignacio Ramirez and contains historical notes and appendices. Each constitution is printed in the original language, and in a translation into either English or Spanish.

Recent publications in the Johns Hopkins University Studies in Historical and Political Science include *The Finances of American Trade Unions*, by A. M. Sakolski, Ph.D.; *Early Diplomatic Negotiations with Russia*, by John C. Hildt; and "*Spanish-American Diplomatic Relations Preceding the War of 1898*," by Horace Edgar Flack.

Prof. F. J. Goodnow has in press a collection of cases illustrating the principles of administrative law. It is divided into two parts, which will be published separately, one relating to government and administration, the other to the law of officers, including extraordinary legal remedies.

[1]Furnished by Prof. J. W. Garner.

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A school of commerce has been inaugurated in Washington and Lee University and was opened to students in September of the present year. Two new courses in economics and two courses in politics were added. H. Parker Willis, Ph.D., has been placed in charge of the school.

Columbia and Yale Universities have concluded an arrangement to carry on in coöperation a series of courses in preparation for the consular service. Columbia offers the larger share of the language work, while Yale does the greater part on the economic side. Students who complete the course will receive certificates issued by both universities jointly and higher degrees will be awarded when the requirements are fulfilled by the university at which the major part of the work is done.

Chester Lloyd Jones, Harrison Research Fellow in political science in the University of Pennsylvania, has recently published, through the Jno. C. Winston Company of Philadelphia, a study of the American consular system, based largely on personal observation of American consulates in Europe.

Prof. John A. Fairlie, of the University of Michigan, has been promoted to the rank of junior professor of administrative law. Professor McLaughlin's course in constitutional law will be given by Dr. Paxson, formerly of the University of Colorado, who has been made assistant professor of history. The remainder of Professor McLaughlin's courses will be given by Dr. C. H. Van Tyne, who succeeds him as Professor of History.

Dr. James T. Young, assistant professor of political science in the University of Pennsylvania, has been made director of the Wharton School of Finance and Commerce.

Dr. W. B. Munro has been appointed assistant professor of political science in Harvard University.

Prof. A. Lawrence Lowell, of Harvard University, has in preparation an elaborate work on the government of England.

The Century Company have in press *American Legislatures and Legislative Methods*, by Paul S. Reinsch, professor of political science in the University of Wisconsin.

Dr. E. H. Strobell, professor of international law at Harvard University, who for the last three years has been confidential adviser

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to the King of Siam and who has exerted great influence in organizing the legal and economic system of the kingdom, was recently stung by a venomous fly while returning from the East. After an illness which came near proving fatal he is now recovering.

Prof. Simeon A. Baldwin, of the Yale Law School, has recently prepared two reports on penalogical subjects, one as chairman of the committee of the American Bar Association on penal laws and prison discipline, and the other as chairman of the committee of the National Prison Association on law reform, both of which reports were adopted by their respective committees. The former recommends the establishment of a national bureau at Washington for the collection and arrangement of material for the identification of recidivists. The latter favors preliminary examinations of those accused of crime, by a magistrate, on the lines approved in Livingston's code for Louisiana.

Paul S. Reinsch, professor of political science in the University of Wisconsin, and Leo S. Rowe, professor of political science in the University of Pennsylvania, were appointed delegates to the Pan-American Congress which was in session at Rio Janeiro during the summer and early autumn. Professor Reinsch returns to his academic duties this fall, but Professor Rowe will spend the ensuing year in South America studying Latin-American politics. His academic chair will be filled during his absence by Mr. Henry Jones Ford, of Baltimore, and Dr. G. W. Scott, of Washington, D. C.

A "Legislative Reference Bureau," similar to that organized for Wisconsin by Dr. McCarthy, has been established in Nebraska under the auspices of the State Historical Society. Mr. A. E. Sheldon, a graduate of the University of Nebraska and a man of wide practical experience, has been put in charge of the work. A similar bureau has been established in Baltimore, Md.

Prof. J. W. Jenks, of Cornell University, who has recently published *Citizenship and the Schools* (Holt), has in press a small book entitled *Great Fortunes* (McClure).

Prof. F. A. Fetter, of Cornell University, has in press a report on the tax legislation enacted by the legislature of New York last year.

Prof. W. E. Hotchkiss, of the department of economics and political science of Northwestern University, has in press a monograph, entitled *The Judicial Work of the Comptroller of the Treasury as Com-*

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pared with Similar Functions in the Governments of France and Germany—a study in administrative law.

Dr. Frank E. Horack has been promoted to the position of assistant professor of political science at the State University of Iowa.

Prof. James A. Woodburn, of the Indiana State University, and Prof. T. F. Moran, of Purdue University, have recently published a text-book for grammar schools on *The History and Civil Government of the United States* (Longmans). Professor Woodburn has in preparation a life of Thaddeus Stevens and will welcome information concerning the subject of his biography from any source.

Prof. G. W. Knight, of the department of history in the Ohio State University, has been appointed by the Governor a member of the Ohio Board of Commissions for the Jamestown Exposition. Prof. A. H. Tuttle, of the same department, assisted in the drafting and in securing the passage of Ohio's new primary election law.

Dr. John Duncan, formerly instructor in the Wharton School of Finance and Commerce of the University of Pennsylvania, has been made assistant professor of sociology and economics in the University of Ohio. Prof. F. A. McKenzie of the same department has recently completed a sociological study, entitled *The American Indian.*

During the absence of Professor Raynolds, of the Yale Law School during the year 1906–07, his courses in comparative constitutional law and in the *Bürgerliche Gesetzbuch* will be given by Gordon E. Sherman, Ph.B., of Morristown, N. J. A new graduate seminary course in public international law is announced by Professor Woolsey and a course on comparative administrative law by E. A. Harriman, author of *Harriman on Contracts*, and formerly of the Northwestern University Law School.

As a result of the agreement between the trustees of Columbia University and the Prussian government for the exchange of American and German professors, Dean John W. Burgess of the Columbia University School of Political Science has been appointed "Theodore Roosevelt Professor of American History" at the University of Berlin for the year 1906–07. The appointee for the year 1907–08 is President Arthur T. Hadley, of Yale University. During Professor Burgess' absence Professor Goodnow will act as dean of the Faculty of Political Science.

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Dr. James T. Shotwell, of Columbia University, has resumed his duties after an absence of two years, one of which was spent in London as a member of the staff of the *Times* and editor of the *Encyclopædia Britannica*, the other attending lectures at the Universities of Paris and Cambridge.

Congress has recently made provision for the publication of a new edition of the Charters, Constitutions and Organic Laws of all the States, Territories and Dependencies of the United States. The compilers and editors are Francis Newton Thorpe and Prof. Benjamin F. Shambaugh.

Dr. Chung Hui Wang, who received the degree of D.C.L. *summa cum laude* at Yale in 1905, has completed a translation into English of the German Imperial *Bürgerliche Gesetzbuch*, which he began when studying under Professor Raynolds of the Yale Law School, and is preparing to publish it at Berlin, where he is attending lectures at the University.

One hundred thousand dollars have been raised by the friends of the late Marcus A. Hanna for the endowment of a memorial chair of political science at Western Reserve University. A fund of seventy-five thousand dollars has also been raised for the endowment of a chair of sociology. A part of the income from both foundations will be devoted to the purchase of books and the maintenance of fellowships. The incumbents of both chairs are to be appointed during the coming year.

Dr. James D. Barnett, formerly of the University of Wisconsin, who was appointed instructor in political science in the University of Oklahoma last year, has been promoted to the rank of full professor and placed in charge of the department.

Dr. Edwin W. Kemmerer has been appointed assistant professor of economics in Cornell University. He received his doctor's degree at Cornell in 1903, after which he went to the Philippines as chief of the division of currency and had charge of the organization of the new monetary system in the islands. In that connection he made a study of the monetary system of the Straits Settlements and of other oriental countries. He was, in the main, the author of the bill establishing the currency division of the insular government and the bill creating the new postal savings bank system for the islands. He has made reports to the government on the question of establishing an

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agricultural bank in the Philippines and on the agricultural bank system of Egypt.

A tax commission of five members has been appointed by Governor Folk, of Missouri, to recommend changes in the tax system of the State. The President of the commission is Hon. F. N. Judson, second vice-president of the American Political Science Association. The secretary is Prof. Isidor Loeb, of the University of Missouri.

Mr. George Blumenthal, of New York, has given $100,000 to Columbia University with which to endow a chair of politics in that institution. The trustees have selected Woodrow Wilson, LL.D., president of Princeton University, and Albert Shaw, Ph.D., editor of the *Review of Reviews*, to be lecturers on the Blumenthal foundation for the year 1906–07.

Prof. Lindley M. Keasbey, of Bryn Mawr College, has been appointed head of the school of political science in the University of Texas. He will be assisted by Dr. Samuel Peterson and Mr. E. T. Miller. Dr. C. H. Huberich, who formerly had charge of the work in political science in that institution, has accepted a call to the Leland Stanford Jr. University.

The New York Public Library has undertaken a project which when completed will be of great value to students of political science and history. It is the preparation of an index of American State documents, covering all regular and special reports and also the journals of the legislatures from the earliest times to the present. The indexes for the States of Maine, Vermont and New Hampshire have been completed and are now ready for the press. The index for each State will be printed separately but the arrangement will be similar for all, so as to facilitate comparative references. The project is receiving the financial support of the Carnegie Institution and is under the direction of Miss Adelaide R. Hasse, of the New York Public Library.

The following appointments to instructorships in political science have been announced: Walter L. Whittlesly, Princeton University; Albert A. Giesieke, Cornell University; Dr. J. W. Putnam, University of Wisconsin; Frederick S. Diebler, Northwestern University; Dr. Wm. M. Davis, Beloit College.

Zeitschrift für Völkerrecht und Bundesstaatsrecht is the title of a new journal the first number of which appeared early this year. Its special field, as indicated by its name, is to be the relations between

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States, and between the members of composite political bodies, including the status of colonies and dependencies. In addition to leading articles and reviews, important conventions and judicial decisions will be printed. Six numbers of the journal are to appear each year. The managing editor is Prof. Dr. Joseph Kohler. Prof. W. B. Muro, of Harvard University, is one of the Board of Editors. The place of publication is Breslau.

B. H. Meyer, professor of political economy in the University of Wisconsin and member of the Railroad Commission of Wisconsin, has published a *History of the Northern Securities Case* giving in connected form the leading facts and principles of this famous case as they are to be found in 8000 pages of records, briefs and arguments filed in the various courts in which the case was adjudicated. The pamphlet appears as a Bulletin of the University of Wisconsin.

The following bibliographies, compiled under the direction of A. P. C. Griffin, have been issued by the Library of Congress: *Discussions of the Fourteenth and Fifteenth Amendments, with special Reference to Negro Suffrage; Primary Elections, Particularly Direct Primaries; Anglo-Saxon Interests (2d issue); The Negro Question (2d issue); Child Labor; Employers' Liability; Mercantile Marine Subsidies; The British Tariff Movement (Chamberlain's Plan); Municipal Affairs, with Special Reference to Municipal Ownership.*

The *Annual Report of the Massachusetts Bureau of Statistics of Labor* contains a chapter, entitled The Incorporation of Trade Unions. This chapter has also been issued separately in pamphlet form.

An American branch of the International Association for Labor Legislation has been formed. One of the objects of establishing this branch is to secure sufficient funds to warrant the publication of an English edition of the *Bulletin of the International Labor Bureau*, published in Basel, Switzerland.

A fourth edition of Esmein's excellent *Élément's de droit constitutionnel français et comparé* has appeared from the press of Larose et Tenin.

The Oxford University press has issued a new (tenth) edition of *Holland's Elements of Jurisprudence.*

A fourth edition of Moyles' *Institutes of Justinian* has been published by the Clarendon Press.

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A new and enlarged edition of Van Tyne and Leland's *Guide to the Archives of the Government of the United States* is soon to be issued. Mr. J. H. Russell will contribute to it a report on the diplomatic, consular, and miscellaneous archives of the Department of State.

A new edition of Jellinek's *System der subjektiven öffentlichen Rechts*, revised and enlarged, has appeared.

Among recent noteworthy works dealing with the relations of Church and State in France are the following: *Lanessan, L'État et les Églises en France depuis les origines jusqu'à la Séparation* (*Alcan*); *Despagnet, La Republique et le Vatican 1870–1906* (*Larose et Tenin*); *Sabatier, La séparation des Églises et de l'État*, (an English translation has been published by Scribner's); *Debidour, L'Église Catolique et l'État en France sous la Troisième Republique, 1870–1906* (Alcan). This work is to be in two volumes, of which the first only, which brings the narrative to 1889, has as yet appeared.

Prof. James T. Young, of the University of Pennsylvania, has in preparation a college text-book on the government of the United States. It will be published by the Macmillan Company in the Citizens' Library.

A. H. Clark Company announce the publication in two volumes of a work, entitled *Documentary History of Reconstruction: Political, Military, Social, Educational and Industrial.* Prof. W. L. Fleming will be the editor.

International Law and Diplomacy[1]

The Algeciras Conference on Morocco. The relations between France and Germany in Morocco having been for some time strained, it was finally agreed that the great powers should go into a general conference on Moroccan affairs. On the joint invitation of France and Germany the conference was convened at Algeciras, Spain, December 15, 1905, to consider a program carefully arranged in advance and agreed upon by the two powers principally concerned. As one of the parties to the general treaty of 1880 the United States was invited to participate and sent as representatives Mr. Henry White, our Ambassador to Italy, and Mr. T. R. Gummer, our minister to Morocco. As the United States had no special interests in Morocco aside from the

[1]Furnished by Prof. John H. Latané.

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powers generally, our representatives were instructed to pursue a thoroughly impartial course and to endeavor to compose any differences that might arise between the powers with a view to bringing about a perfect accord. Further than this they were to stand for an "open door" policy and for religious and racial tolerance. After a three months' session the conference finally reached an agreement the last of March. The two burning questions of financial reform and police organization were settled by a compromise between the rival claims of Germany and France, though the general result was decidedly favorable to France. For a period of five years the maintenance of order in Moroccan ports is placed in the hands of France and Spain. In the matter of finance, it was agreed that the Bank of Morocco be established at Tangier under international control, each of the signatory powers to have one share, with the exception of France, which is to have three. The bank will be controlled by four supervisors appointed by the banks of England, France, Germany and Spain. France gained most of the points for which she contended and greatly increased her prestige. Her views were supported by Russia, England, and even by Italy. The conference emphasized the growing isolation of Germany in Europe, Austria being the only power to stand by her.

DEATH OF CARLOS CALVO. Carlos Calvo, the Argentine publicist, died in Paris, May 2, 1906, at the advanced age of 82. He had filled many important consular and diplomatic positions and at the time of his death represented his country as minister to France. He is best known, however, by his works on international law, the most important of which are: *Derecho Internacional teórico y prático de Europa y América;* the French edition of the above, *Le Droit International théorique et practique, précédé d'un exposé historique des progrès de la Science du droit des gens; Manuel de Droit International; Recueil Complet des Traités, Conventions, etc., de tous les États de l'Amérique Latine depuis l'Année 1493 jusqu'à Nos Jours;* and a dictionary of international law and diplomacy.

Calvo was undoubtedly very learned in the law and scholarly in his methods, but he was a compiler rather than an original thinker. He is most widely known today by the doctrine which bears his name and to which he gave expression in his great work on international law. The Calvo Doctrine, briefly stated, is that the recovery of debts and the pursuit of private claims does not justify the armed intervention of

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governments. Since M. Drago's note to the United States Government of December, 1902, on the subject of pecuniary claims, this principle has been usually referred to as the Drago Doctrine, though as stated by Drago it is less comprehensive and more specific than as stated by Calvo.

CENTRAL-AMERICAN WAR. About the middle of June Generals Barillas and Toledo started a revolutionary movement in Guatemala for the purpose of overthrowing the government of President Cabrera. During the progress of hostilities difficulties arose with Salvador and Honduras, both of which states declared war against Guatemala, Salvador on July 11 and Honduras on July 14. Through the good offices of the United States an armistice was agreed to July 17 and arrangements made for a meeting of peace commissioners on board the United States cruiser *Marblehead*, where a treaty of peace was signed July 20.

MEETING OF THE INTERPARLIAMENTARY UNION. The Interparliamentary Union held its meeting in London July 23, 1906, and continued in session for several days. There were present 566 delegates representing 20 different countries. Resolutions were passed in favor of enlarging the scope of arbitration agreements, and urging the various powers to place upon the program of the next Hague Conference the question of the limitation of naval armaments.

THIRD INTERNATIONAL AMERICAN CONFERENCE. The Third International American Conference opened its session at Rio Janeiro, July 23. All the American Republics sent representatives except Haiti, Venezuela and Santo Domingo. The presence of Secretary Root at the opening of the Conference attracted general attention. The delegates from the United States were given chairmanships on the following committees: the Drago Doctrine, William I. Buchanan; commercial relations, Paul S. Reinsch; the codification of laws, L. S. Rowe; patents, ex-Governor A. J. Montague; sanitation, John Larrinaga, Porto Rican commissioner to the United States; publications and general welfare, Van Leer Polk. The most important subjects considered by the conference were: (1) the reorganization of the International Bureau of American Republics on a more permanent basis; (2) a resolution affirming the adherence of the American Republics to the principle of arbitration for the settlement of disputes arising between them, and expressing the hopes of the Republics taking

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part in the conference, that the International Conference convened at The Hague will agree upon a general arbitration convention that can be approved and put in operation by every country; (3) a resolution recommending to the different Republics the extension for the further period of five years of the Treaty of Arbitration for Pecuniary Claims agreed upon at the Mexican Conference between the different Republics; (4) a resolution recommending that the Second Peace Conference at The Hague be requested to consider whether and if at all to what extent the use of force for the collection of public debts is admissible. A number of subjects of less importance also received consideration. The Conference adjourned the last of August. The report of what was actually accomplished has not yet been made public.

LAKE MOHONK CONFERENCE ON INTERNATIONAL ARBITRATION. The Report of the twelfth annual meeting of the Lake Mohonk Conference on International Arbitration has been published. The Conference adopted the following platform and resolutions:

Platform: "At the present time it is important that public attention should be concentrated upon the second Hague Conference soon to be assembled. We hope and believe that the beneficial results of the former conference will be equaled and perhaps surpassed by further deliberations in the land of Grotius, upon the principles of international law and the best methods for the pacific settlement of international difficulties.

"Especially we hope that the second Hague Conference will elaborate and propose a plan by which like conferences may be held at stated periods and that in the intervals appropriate offices may be maintained at The Hague, so that these conferences may become a permanent and recognized advisory Congress of the Nations.

"A general arbitration treaty to be formulated by The Hague Conference is most desirable and will doubtless be accepted by all or nearly all of the countries represented in the conference.

"Among other subjects of immediate importance the many unsettled questions arising out of maritime warfare, including the exemption of private property from seizure at sea, and the neutralization of ocean routes, are respectfully commended to the consideration of The Hague Conference.

"As the general restriction of armaments can only be secured by concurrent international action, unanimously recommended by the

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British House of Commons, we earnestly hope that this subject will receive careful and favorable consideration.

"While we shall welcome any action taken by the coming Hague Conference in the way of clearly defining the rights and obligations of belligerents as to each other and as to neutrals; of lessening the horrors of war; and of giving increased stability and protection to the Red Cross movement; it is our hope that the Conference will remember that it is consecrated to the great work of ending as well as softening war, and of subjecting the relations of nations to the dominion of law rather than force."

Resolutions. "*Resolved:* That the twelfth annual Lake Mohonk Conference on International Arbitration respectfully petitions President Roosevelt to instruct the delegates from the United States to the next Hague Conference to urge that body to give favorable consideration to three measures which will greatly conduce to the peace and welfare of the world:

"A plan by which The Hague Conference may become a permanent and recognized Congress of the Nations with advisory powers.

"A general arbitration treaty for the acceptance of all the nations.

"A plan for the restriction of armaments and if possible for their reduction by concurrent international action."

The volume of *Foreign Relations of the United States* for the year 1905, which has been recently issued by the Department of State, is one of more than ordinary interest. Pp. 298–412 contain the full correspondence relating to the Santo Domingo treaty, the text of the treaty, and of the *modus vivendi*, and the correspondence relating to the practical operation of the latter.

Pp. 204–234 contain more material on the Chinese boycott of American goods.

Pp. 650–653 contain the text of the Treaty between the United States and Certain American Powers for the Arbitration of Pecuniary Claims, signed at the Mexican Conference, January 30, 1902, and ratified by the United States, January 28, 1905, together with the President's proclamation of the same. This treaty was not published in the statutes of the 58th Congress, third session, but will appear in the statutes of the 59th Congress, first session.

Pp. 668–688 contain the correspondence relating to the preliminaries of the Algeciras Conference on Moroccan affairs, and the instructions to the United States delegates.

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Pp. 807–828 contain the correspondence relating to the Portsmouth Peace Conference, together with the text of the Russo-Japanese Treaty and other documents of interest and importance.

Prof. Amos S. Hershey, of the department of political science in the Indiana State University, has in press a book, entitled *The International Law and Diplomacy of the Russo-Japanese War*. The work will deal with such subjects as the causes of the war, the violation of Korean neutrality, the question of contraband, submarine mines, the North Sea incident and the Portsmouth treaty. The work grew out of a series of articles which Dr. Hershey published in the *Green Bag* shortly after the close of the war.

The eagerly looked for *Digest of International Law*, by John Bassett Moore, has made its appearance in eight volumes. It is undoubtedly the most important publication issued by the Department of State in many years. No better equipped man for the task could have been found than the author, John Bassett Moore, whose monumental work on the *History and Digest of the International Arbitrations to which the United States has been a Party* (published by the Government in 1898) has already given him a world-wide reputation as a publicist. The present work is not yet quite ready for general distribution, as the eighth volume (the Index) has not been completed. No extended review will, therefore, be attempted at this time, but a preliminary notice will doubtless be of interest. Mr. Moore undertook this task nine years ago. The act of February 20, 1897, which authorized the work, contemplated a revision of Wharton's *Digest of the International Law of the United States*, which was published in three volumes in 1886, and a second edition of which was published in 1887. Mr. Moore soon found that a mere revision would be altogether inadequate, as much of the new material could not be classified under the titles of the old work. He, therefore, found it necessary to adopt a new and greatly extended classification. The new work is thus a much more complete treatise than the old. Practically all of Wharton's material has been retained, but it has been rearranged and supplemented, and a vast amount of new material added, particularly relating to international transactions growing out of the war with Spain. Mr. Moore has drawn from the manuscript records of the Department of State beginning with the earliest records, from documents published and unpublished issued by presidents and secreta-

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ries of state, from the opinions of attorneys-general, and the decisions of Federal and State courts, from treaties, from the awards of international tribunals, and from the writings of jurists. The work covers every question of importance that has arisen in American diplomacy.

Mr. Moore calls his work *A Digest of International Law,* abandoning the awkward and misleading title employed by Wharton, *A Digest of the International Law of the United States.* On this point he say, by way of explanation, that "there is strictly speakine no such thing as 'the international law of the United States,' or thg 'international law' of any other particular country. The phrase is itself a misnomer, and conveys an implication which the Government of the United States has always been the first to repel, for it has ever been the position of the United States that international law is a body of rules common to all civilized nations, equally binding upon all and impartially governing their mutual intercourse."

A commendable feature of the work is that quotations from printed sources, which are readily accessible to the general reader, though inserted in their proper place so as to give a complete statement of the case, have usually been abridged, while quotations from manuscripts have been given in full. The references, so far as one is able to judge from a cursory examination, are much fuller and more exact than in Wharton. Students will be glad to see that where the manuscript archives of the Department which have been published in the public documents or elsewhere are quoted, reference is made to the volume in which they are published as well as to the manuscript folio.

Houghton, Mifflin & Co. will publish this fall a new work by John W. Foster, entitled *The Practice of Diplomacy.* Its aim, as announced, will be to set forth the part taken by American diplomatists in the elevation and purification of diplomacy; and secondarily to give in popular form the rules and procedure of diplomatic intercourse.

The following international law reviews have been recently established:

Revue Japonaise de droit international. (Tokio, Japan.)

Revista di diritto internazionale. (Rome, Italy.)

Revista de derecho internacional, the Marquis of Olivart, Editor (Madrid, Spain).

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MUNICIPAL[1]

1. MUNICIPAL POLITICS. During the year which precedes the issue of the first number of THE AMERICAN POLITICAL SCIENCE REVIEW, there have been many successes in the movement for the improvement of political conditions in American cities. The local elections of November, 1905, resulted in notable victories for reform in Philadelphia and Cincinnati, with less striking results in other cities. And these have been followed in more cities at the spring elections of 1906.

Most attention is usually attracted to the municipal campaign in New York City. And the last election there, while of less significance than several others in the preceding decade, was not without points of interest. Mayor McClellan's first administration (1904–05) had been so much better than previous Tammany governments, and the fusion of forces that had elected Mayor Low in 1903 had become so disorganized, the early prospects were for a very inactive campaign. But the nomination of William R. Hearst for mayor on a municipal ownership ticket, and a regular republican ticket, in addition to the renomination of McClellan led to an exciting contest. The three-cornered contest resulted in the re-election of Mayor McClellan by a narrow plurality, and the election of a board of aldermen controlled by the republicans and municipal ownership parties. At the same time the growth of independent sentiment was strikingly shown by the re-election as district attorney for New York county of W. T. Jerome, who was first nominated by petition entirely independent of all the party tickets, although later endorsed by the republicans.

The Philadelphia election was the most striking success for municipal reform, although only minor positions were directly at stake. The popular uprising in the preceding May against a proposed renewal of the lease of the City Gas works, aided by the dramatic break between Mayor Weaver and the machine politicians, prepared the way for an energetic campaign by a newly organized city party for the county offices to be filled in November, and the victory of this party by a majority of 45,000 demonstrated that the people of Philadelphia have at length been aroused from the lethargy which has so long been the greatest obstacle to overturning the corrupt ring that has been in control of the municipal government. While the officers elected in November were not of the greatest importance the result

[1]Furnished by Prof. John A. Fairlie.

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of the election has been greatly to advance the betterment of municipal conditions. It strengthened the hands of Mayor Weaver in the conduct of the municipal administration. It led to a special session of the legislature in the spring of 1906 which repealed the "ripper bill" of the previous session reducing the Mayor's power, and passed a new civil service law and corrupt practices acts for Philadelphia, besides enacting other reform measures of more general application, such as personal registration and uniform primary laws. And in February the election for some members of the city councils resulted in another victory for the city party, in spite of superficial changes in the personnel of the old organization.

Almost as significant was the election in Cincinnati. Here a fusion of the reform forces with the minority democratic party was successful over the notorious Cox machine, electing Judge Edward J. Dempsey as mayor. Early in 1906 a legislative committee began the task of investigating previous conditions, and secured many disclosures and the return of over $200,000 to the county from former county treasurers, for gratuities received by them from banks in which county funds were deposited. The work of the committee was, however, halted by a decision of the Supreme Court of Ohio restricting its power to examine witnesses.

Among other Ohio cities, Cleveland re-elected Tom Johnson as mayor for the third time, and Toledo elected as mayor Brand Whitlock, on an independent ticket.

In Buffalo, J. N. Adam a leading merchant, with an excellent record in the smaller branch of the bicameral council, was elected mayor. A recently organized municipal league took an active part in the campaign. It also investigated a number of city and county matters that needed attention; and disclosed a good deal of laxness, extravagance and some corruption in public business.

In Indiana all of the cities elected municipal officers for a period of four years, under the provisions of the new uniform code in that State. There was much more interest taken in the local elections than formerly; and in many places a distinct improvement in the municipal officers elected.

Of the elections in the spring of 1906 the most notable was in Pittsburgh, where George W. Guthrie was elected mayor. Although nominated on the democratic ticket Mr. Guthrie has been a leader in municipal reform work for many years, and is well known as a member

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of the executive committee of the National Municipal League. His administration has been marked by many changes for the better; and under the greater Pittsburgh act his jurisdiction was extended to and include Allegheny City after the first of May.

In Kansas City, Mo., the election was marked by the personal interest of Governor Folk to prevent frauds, and the success of the Civic League. All of the candidates on the general ticket endorsed by the league were elected—this including the mayor, H. M. Beardsley, the treasurer, auditor, police judge and eight members of the upper house of the city council. In at least three cases, where candidates on the minority ticket were elected, the result seems to have been due to the recommendations of the league. Seven of the eight ward candidates recommended (out of fourteen wards) were also elected, and in at least two cases the results seemed due to the league.

An exciting campaign in Milwaukee resulted in the election of the young republican candidate, Sherburn Becker, over David A. Rose, nominated for a fifth term. It was clearly a personal victory over a well intrenched political machine, as was shown by the re-election of the democratic city treasurer. For aldermen the recommendations of the Voters' League were very generally followed.

The general character of the movement for the reform of municipal politics is indicated by conferences and meetings representing many local communities. In January, 1906, a conference was held at Chicago, called by the Municipal Voters' League of that city, and including representatives from similar local organizations in other cities. This discussed a number of problems, and adopted a brief series of resolutions favoring certain definite reforms.

In March, a conference on ballot, primary and corrupt practices legislation was held in New York City under the auspices of the National Civic Federation.

At the twelfth annual meeting of the National Municipal League held at Atlantic City, in April, Hon. Charles J. Bonaparte was re-elected president and Clinton Rogers Woodruff secretary. The subject of President Bonaparte's annual address was, "Why we have unsatisfactory public servants when we can get good ones." Mr. Woodruff's annual report as secretary, reviewing the year's municipal progress was unprecedented in the excellent showing which it made.

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2. MUNICIPAL ORGANIZATION. No general legislation on municipal government has been enacted in 1906, comparable to the Ohio code of 1902 or the Indiana code of 1905. An effort was made in Ohio to secure the amendment of the law in that State, by increasing the powers of the mayor; but no substantial result was attained. Some important changes have, however, been made in a few large cities, and in several others plans for general charter revisions are under way.

One of the acts of the special session of the Pennsylvania legislature provided for enlarging the city of Pittsburgh to include Allegheny City, but this simply extended the existing municipal organization to the larger city.

In Massachusetts some important changes have been made in the government of Boston; and a new charter for Cambridge has been proposed. Since 1885 the police of Boston have been under the supervision and control of a commission of three members appointed each for a term of five years by the governor of the Commonwealth with the confirmation of the governor's council. Not more than two of the three commissioners could be selected from any one political party. To this commission was also entrusted the power of hearing and determining all applications for licenses to sell intoxicating liquors.

This system has not proven wholly satisfactory, partly because the members of the board have not always worked in entire harmony, and partly because the commission has been somewhat hampered by the junction in its hands of the two different functions of police and excise control. Governor Curtis Guild, Jr., in his inaugural message, therefore, recommended a change in the system and his recommendations have been carried into effect by the legislature in a measure which went into force on June 1, 1906. By the terms of this law the supervision of police in Boston is henceforth committed to the charge of a single commissioner appointed by the goveror with the consent of his council for a five year term, and removable at any time for cause by the governor with the council's concurrence. This commissioner is to be paid an annual salary of six thousand dollars from the treasury of the city, and the necessary expenses of his office including the salaries of secretary and clerks are to be similarly defrayed. All the authority formerly exercised by the Boston police commission now passes, with one important exception, to the single commissioner.

This one exception is the control of liquor licenses. For the super-

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vision and regulation of sales of liquor a new excise board is provided by the act, to consist of three members, appointed in the same manner as the police commissioner, but for a six year term only. Provision is made, however, for the retirement of one member every second year. One of the three members is to be designated by the governor as chairman of the board. The salary of the chairman is fixed at $4000 and those of members at $3500 per year. These salaries together with all the necessary expenses incident to the work of the board are to be paid by the city of Boston. The new excise commission takes over, with the beginning of June, 1906, all the "powers and duties relative to intoxicating liquors now imposed upon the board of police of the city of Boston."

The chief opposition to the measure was based upon the ground that since the work of listing voters in Boston was performed by the police the placing of police control in the hands of a single official instead of in the hands of a bi-partisan board, would be unfair to the political party which formed a minority in the State. Although Boston is strongly democratic, the work of listing voters in that city would be under the sole supervision of a single official, presumably a republican, appointed by and responsible to a republican governor. To meet this objection the measure was amended to provide that the listing and registration of voters should be under the supervision not only of the police commissioner but of one member of the bi-partisan board of election commissioners, such member to be named by the mayor of Boston. In case these two officials fail to agree the chief justice of the municipal court of Boston is to have the deciding voice.

The measure, as amended, was passed in both houses of the Massachusetts legislature by large majorities, and it is expected that the new system will have highly effective results. The only other city of Massachusetts which has State control of its municipal police—the city of Fall River—will continue for the present with its bi-partisan board.

For some years past the members of the board of aldermen in the city of Boston have been elected by the voters of the city at large under a system of "limited voting." The city is divided into eleven aldermanic districts, and the thirteen aldermen must be residents, one each of nine districts, and two each of the remaining two districts. Voters may indicate their choice of not more than seven names on the ballot, so that ordinarily the dominant party elects seven, and the minority party six of its candidates.

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During the 1906 session of the State legislature a measure passed both houses providing for the election of aldermen by districts rather than by the city at large. This bill was, however, vetoed by the governor, and the legislature has failed to pass it over his veto by the necessary two-thirds vote.

An interesting and important experiment in school administration is being tried in Boston. Prior to the elections of 1905 the Boston school board was a large and cumbersome body in the election of members to which partisanship played a dominating part. The legislature, however, by law reduced the board in number to five members elected by the city at large. At the election of 1905 these were elected two for a three year term, two for a two year term, and one for a single year. The excellent set of men elected gives ground for hope that under the new system the school administration will be conducted on a very superior plane.

The proposed new charter for Cambridge, Mass., action on which has been postponed until next year, contains two important features. These are, the provision that practically every employee of the city from highest to lowest, including the heads of the city departments, shall be selected in accordance with civil service rules, and the provision that the members of a very large common council shall be elected one from each precinct of the city.

In Newport, R. I., a new charter framed by a local municipal association and granted by the State legislature was adopted by popular vote in June. The most notable feature is the establishment of what is called a modified "town meeting." In place of a small municipal council, there is to be a large body of 195 members, 39 chosen from each of the five wards of the city. There are to be no party nominations, but candidates are to be presented by petitions containing thirty signatures.

This large council is limited to deliberation and to the appropriation of money. A small board of aldermen is retained for executive work; and the powers of the mayor are largely increased. This experiment in city government will be watched with much interest.

Proposed new charters are being drafted for Chicago and Buffalo, to be presented to the coming sessions of the State legislatures. In Chicago the work is in charge of a large commission appointed by the governor, the presiding officers of the State legislatures, the mayor, the council, and the special local authorities. The object is to con-

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solidate to some degree the various independent local bodies with the city government, under the provisions of a recently adopted amendment to the State Constitution. In November, 1905, some minor changes in the city government were adopted, extending the mayor's term to four years and establishing a system of municipal court justices.

3. Municipal Ownership. A steady expansion in the scope of municipal functions is clearly evident. And under the *régime* of enumerated powers this requires a large volume of legislation—much of it of special application—to authorize new undertakings. The step toward the municipalization of such plants as waterworks, electric lighting, and street railways are especially interesting and significant. Here on the one hand is a strong sentiment in favor of municipalization as a principle of public policy; and on the other hand a strong opposition based partly on the private interests likely to be affected, and partly on considerations of general policy.

Chicago forms the chief point of attention on account of the agitation there for municipal street railways, and the election of Mayor Dunne in 1905 on a platform calling for immediate municipal ownership and operation. Against the wishes of the mayor, the council committee on local transportation last winter re-opened negotiations with the companies for a new franchise grant. But the council submitted to the voters at the April election the question of proceeding under the provisions of the Müller law to purchase and operate the lines. Just before the election a decision of the Supreme Court of the United States declared invalid the claims of the companies to rights in certain streets for ninety-nine years from 1865; and under this decision practically all of the franchises in Chicago streets have expired. At the election the proposition to issue certificates to secure municipal ownership of the lines was carried by a small majority, but the vote on municipal operation—while showing a majority in favor—was not equal to the three-fifths vote required under the statute. A case to test the validity of the street railway certificates proposed to be issued is now before the courts; and further action is delayed until a decision on this point is secured.

The January bulletin of the U. S. Bureau of Labor contains a valuable report on municipal ownership in Great Britain, by Frederic C. Howe, Ph.D. The report is based on a study of the leading cities

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in England, Scotland and Ireland made during the summer of 1905, the investigation being conducted largely by personal inquiry and conference with officials and citizens of the cities studied.

An exhaustive investigation of the facts concerning municipal and private plants for these public utilities has been undertaken by a special commission of the National Civic Federation. Detailed examinations of a number of the most important plants in the United States and Great Britain are being made by engineers and accountants. And the report of the commission—which represents prominent men of all shades of opinion on the general question—is expected to present a body of accepted facts, which will form the basis for further discussion.

In Massachusetts the alternative policy of regulating private companies has been carried a step further in the "sliding scale" gas bill passed for the city of Boston. The new law fixes the price of gas for the next ten years at ninety cents a thousand. It also fixes the dividends on the company's stock at seven per cent, with the privilege of increasing it one per cent for every five cent reduction in the price of gas. If the prices are kept up and profits accumulate, the surplus after setting aside five per cent of the capital as a reserve fund, is to go to the city. Additional stock issues are also regulated, and must first be offered for sale at public auction. After ten years the State Gas Board may alter the price.

The New York Society for Improving the Condition of the Poor has recently extended its field of activity to include the furnishing of physical relief to needy school children. A large committee, including the representatives of various charitable organizations of New York, together with specialists in the diseases common to children, has been appointed to study the physical welfare of school children, to secure the establishment of a system of school records that will reveal the existence of physical ailments among school children, and to use the information so acquired in stimulating interest and in securing adequate appropriations to meet the needs disclosed.

The Civic League of St. Louis, under the direction of Secretary Mayo Fesler, is making extensive investigations into the smoke conditions and the housing conditions in that city. The results will be embodied in published reports, which will contain recommendations looking to the solution of the problems by appropriate legislation.

The league is also drafting a comprehensive city plan similar to the

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Burnham plan for San Francisco. It will include public buildings, street improvements, civic centers, an inner and outer park and boulevard system and recommendations of necessary legislation which will enable the city to carry out the projected plans.

The efforts of the league to secure the passage of an ordinance calling for the election of thirteen freeholders to draft a new charter, will be renewed when the municipal assembly meets in the fall. The committee last spring submitted an ordinance to the city council with a statement of reasons why the city needed a new charter but the council refused to act favorably on the proposition because of the agitation for an eleven million dollar bond issue for public improvements. The bond issue containing appropriations for a free municipal bridge, court building, health department building, hospitals, small parks and boulevards, passed by a large majority in June.

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BOOK REVIEWS

Recht und Technik des englischen Parlamentarismus. Die Geschaftsordnung des House of Commons in ihrer geschichtlichen Entwicklung und gegenwärtigen Gestalt. *Von* DR. JOSEF REDLICH. (Leipzig: Duncker & Humblot. 1905. Pp. xx, 881.)

Dr. Redlich's *Recht und Technik des englischen Parlamentarismus* may be considered as the latest of a series of treatises intended for the guidance and instruction of younger parliamentary bodies. The Mother of Parliaments has been used as a model, more or less directly and to a greater or less degree, by every nation now possessing parliamentary institutions; and in undertaking the present work, Dr. Redlich has had in mind the difficulties under which legislative business is now carried through the German Reichstag. There is not, however, the same definite intention of holding up the English Parliament as a model, that inspired the writing of Hooker's account of English parliamentary procedure in the reign of Queen Elizabeth, as a guide book for the use of the Irish Parliament; or that induced Mirabeau to undertake in 1789 the translation of the rules of the House of Commons for debate and for voting for the benefit of the États Généraux; or encouraged Jefferson in the work of drawing up the Manual of Parliamentary Practice for the use of the Senate of the United States in 1801—practice founded as he acknowledged on the lines of that of the English Parliament which was the model that all had studied. Dr. Redlich's work is far too extensive and goes far too deeply into the detail of the history of parliamentary development to be of use merely as a manual, even if this were the main purpose which he had in mind when he undertook the work.

It was not with the Parliament and central government but with local governing bodies that Dr. Redlich began his studies of English institutions; and to understand his point of view it is well to turn

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back to his *Local Government in England*, a translation of which by Francis W. Hirst appeared in 1903. There we find an explanation both of his sympathy with democratic progress, and also of some lingering prejudices in favor of the old order as compared with the new, which are both clearly marked in the great work on the English Parliament. When he first came to England in the early nineties, Dr. Redlich tells us, it was as a student and follower of Dr. Gneist, thoroughly imbued with the theory of English government which had been put forward with so much learning and cogency by Dr. Gneist in his *Self-Government* in 1871 and his *English Constitutional History* in 1882. The erudition and theoretic completeness of Gneist's work, coming as it did just at the time of the organization of the German Empire, colored the whole of German conceptions of English institutions, and has since caused in Germany a profound misunderstanding of English life and politics. Gneist was a Hegelian and his method one of deduction. Starting with a theory he proceeded to fit into its framework all the facts he had gathered in the course of a painstaking and most thorough research into English governmental institutions. He then proceeded to deduce from the premises he had laid down, all the future consequences of decay and ruin which he thought awaited English institutions through the fatal introduction of the ballot and of the principle of representative local government which he foresaw would replace government by the old landed gentry as appointed justices of the peace.

Starting his investigation from the basis of this theory, Dr. Redlich found himself obliged shortly to relinquish it, and to recognize in English institutions an origin and a vitality wholly different from those attributed to them by Dr. Gneist. Instead of the central government having conferred all authority on local institutions and these institutions possessing their vitality as a delegation from the state, Dr. Redlich found that it is the people who have given to Parliament its authority over the nation, and instead of the state standing over against society—the people—as the sole savior of the nation from the anarchy which the impulses and interests of society always tend to bring about, the state is created by society—by the nation with its manifold interests, and is deputed by the nation to guard and conciliate these interests. With the conception of society as the inveterate foe of the state, Gneist necessarily saw in the exten-

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sion of the franchise and the institution of voting by ballot a dissolution of the power of the state; and in the anarchy which he predicted, he looked for the salvation of England only in a dictatorship upheld by the ever-increasing army of civil servants, and by the small but disciplined police force.

Dr. Redlich, although no more conscientious or erudite than Dr. Gneist, has arrived at a far truer understanding of the nature of English institutions. He sees that Dr. Gneist's predictions of ruin and disaster have been falsified; and in seeking the reason, he has entirely rejected the theory from which Dr. Gneist started, and in his two great books, *English Local Government* and the *Principles and Working of English Parliamentary Government*, Dr. Redlich endeavors to give an accurate picture of English institutions as they now exist, with the story of their development.

The difficulty of carrying on parliamentary business under the conditions prevailing in most modern parliamentary assemblies is, in Dr. Redlich's opinion, the great problem in modern political theory and practice. Dr. Redlich accepts democratic government as a fact. He does not, like Dr. Gneist, lament over it as the precursor of downfall to the state. But he does see in the election to Parliament of groups representing special interests or nationalities, the loss of the simple and dignified procedure which characterized the English Parliament in pre-reform days. In the years between 1688 and 1832, the House of Commons was an assembly of gentlemen, though as a representative body it was the choice only of the ruling classes—of a very small section of the nation. Still to this fact—the fact that Parliament definitely represented and belonged to the aristocracy—Dr. Redlich traces a feeling of responsibility for the honor and the actions of the nation which prevented any party in Parliament from acting obstructively. Parliament belonged to all its members. The rules of Parliament were their own rules, and it was a matter of honor to play the game fairly, and to uphold faithfully the rules and observances which they as members of Parliament had drawn up for their own guidance. From this point of view, Dr. Redlich considers the hundred and fifty years from 1688 to 1832 the golden age of English parliamentary usage. Debate was dignified and unhindered, and a body of rules had gradually come into existence which exactly fitted the needs of the assembly, preventing anything in the way of personal altercation or bitterness;

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giving to every member an opportunity of expressing his opinions; and in every point preserving to Parliament the dignity and decorum of which every member was a jealous custodian.

The first real breach in the liberties and dignity of Parliament came with the introduction of the Irish Nationalists; and the strengthening of this party through the Reform Acts of 1867 and 1885, created a force bent on obstruction, and brought about the necessity of meeting parliamentary tactics of this kind with new rules and more drastic authority. Dr. Redlich regrets the necessity for the introduction of the closure into the English Parliament; but he thoroughly justifies it, and shows that without it, under modern conditions, it would be impossible to conduct parliamentary business. Obstruction he traces to the feeling of the Irish that they were in an assembly that did not belong to them. They had not assented to the rules, and did not feel bound to act up to their spirit. With the introduction of the Irish the old feeling of solidarity and of *esprit de corps* which had characterized the Parliament of the eighteenth century was broken up, and such a feeling can never be regained, as the later labor or socialistic groups which find their way into the House of Commons feel themselves in an antagonistic assembly, and are little likely to fall in with the old feeling of respect for the rules of the game.

Besides the general introduction and the conclusion, Dr. Redlich's work falls into twelve parts. The first book, which includes two parts, contains the history of the development of parliamentary procedure. This is divided into two periods, the first from the beginnings of Parliament in the reign of Edward III. to 1832; and the second from 1832 to 1902. The last chapter of this book is devoted to the changes and reforms made by Mr. Balfour in 1902. If the changes proposed by Sir Henry Fowler's committee on procedure are adopted, there will be a need for another chapter, for the changes now under consideration are almost revolutionary in character. They tend to bring procedure in the House of Commons into line with that of our Congress, by delegating much of the work now done in committee of the whole house to standing committees—a change which will affect the character of the British Parliament more profoundly than any change since the Reform Act of 1832.

The first two chapters of the second book, Dr Redlich devotes to the authorities and literature of English parliamentary procedure.

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The bibliography given in these chapters is full and well arranged. It includes works as recent as Morley's *Life of Gladstone*, 1903, and Sidney Low's *Governance of England*, 1904. There is a curious misprint in the name of Edward Lummis, author of the *Speaker's Chair*, which recurs several times when this book is cited as an authority; and the books given in the bibliography are of very uneven value, some being of slight account as authorities—a fact of which the reader is in no way warned, the bibliography not being critical.

Following this section comes the description of Parliament, including its meeting place; the ordering of its business; the opening of the session, and constitution of Parliament; prorogation; the description of the sittings of Parliament; the relations of the two Houses; the relations of the Crown to Parliament; parties in Parliament; the social character of the House of Commons; the speaker of the Commons and the other officers of the House; committees; motions; debates; the process of legislation; budget procedure, and private bills. In all these sections Dr. Redlich carries the story up to 1905—to the last Parliament of the recent Conservative era in England. In this respect his book supersedes Sir T. Erskine May's *Parliamentary Practice*, the first edition of which appeared in 1844, but which has several times been revised and brought up to date. Dr. Redlich's work covers much the same ground as Sir Erksine May's; but contains in addition historical sketches of the development of all procedure described, combining in this way with May's book, much of the historical work, so far as it concerns the working of the House, of Porritt's *Unreformed House of Commons*. Dr. Redlich has not concerned himself with the question of the relations of Parliament to the constituencies, or with the franchise, either historically, or as these exist at the present time—a fact which differentiates his work, from the *Unreformed House of Commons*, a large portion of which is devoted to these subjects.

England will owe a great debt of gratitude to Dr. Redlich if his monumental work is instrumental in removing the misunderstanding of English institutions in the minds of German scholars which has done much to cause, or at any rate, to perpetuate friction between the two European branches of the Teutonic race—Anglo-Saxon and German. For the sake of the United States as well as of England, it is to be hoped that Dr. Redlich's friend and English adviser, Mr. F.

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W. Hirst, of the Inner Temple, who gave the world so excellent a translation of Dr. Redlich's *Local Government in England* will again undertake the work of translation and give an equally good rendering in English of the *Principles and Working of English Parliamentary Government.* If Mr. Hirst does undertake this work, there is no doubt that he will add to the value of the book by giving a full and accurate index, instead of the scanty and imperfect one in the German edition. He will also doubtless remove a number of minor blemishes in the misspelling or misrendering of English names and titles—matters perhaps of little consequence, but irritating to the reader familiar with the correct forms.

A. G. PORRITT.

Roman Private Law: Founded on the "Institutes" of Gaius and Justinian. By R. W. LEAGUE, M.A., B.C.L., Fellow of Brasenose College, Oxford. (London: Macmillan and Company; New York: The Macmillan Co. 1906. Pp. ix, 429.)

This volume is the latest contribution to the academic study of the Roman law in England. The author says in his preface that it is an attempt to meet a want which he has felt "in teaching Roman law at Oxford, viz: some book which is content to give as simply as possible the subject-matter of the Institutes of Gaius and Justinian, following, in the main, the original order of treatment." The significance of this book as an educational treatise may perhaps best be indicated by looking at it with reference to two points: first, the extent to which it supplements the expository works already accessible to the English student; and, secondly, the extent to which the highest benefit to be derived from the study of the Roman law can be obtained from such an exposition of the subject-matter of the Institutes of Gaius and Justinian.

When the author assumes that for purposes of elementary study the legal system of the Romans can best be understood by following the order of treatment adopted by their own institutional writers, he is no doubt entirely correct. It would hardly seem necessary to defend such a proposition were it not for the fact that this order of treatment is often ignored. It is of course quite competent to one who so desires, to criticise the order of the Institutes and to suggest another arrangement as being more logical than that of the Roman

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writers. But it seems absurd to suppose that the legal principles expounded by the Roman writers can be better understood by recasting them into a form utterly foreign to that employed by the writers themselves.

The whole body of the private law, according to Gaius, relates either to persons or to things, or to actions (*vel ad personas pertinet vel ad res vel ad actiones*), which classification was followed in the Institutes of Justinian. Since the revival of the study of the Roman law, however, there has been a strong disposition to depart from the order laid down in the Institutes. The early Italian "glossators"—whose method involved simply exegetical comments on the text of Justinian, chiefly the Digest—were oblivious to the need of any systematic arrangement; and hence their work, great as it was, left the law in the form of an incoherent mass of hermeneutical fragments. It was the French civilians, with their greater love of system, who first perceived the need of viewing the law as an organic whole. These writers, therefore, attempted to rearrange the whole Justinian law upon some scientific basis, not feeling bound, however, to the order of the Institutes. This tendency, which began with Petrus Ramus and Donellus, reached its culmination in Domat's famous work, *Pandectæ Justinianæ in novum Ordinem Digestæ.* In Germany the study of the Roman law came to be pursued, not so much for expounding the laws of Justinian, as for discovering and systematizing the laws in force in the German states. This exposition of the Romano-Germanic law is embodied in the works known as the *Pandekten,* which adopt with more or less strictness the following conventional order: (1) General principles, (2) law of things, (3) law of obligations, including contracts and delicts, (4) law of the family, (5) law of inheritance. This arrangement has been generally adhered to, even in the German *Institutionen,* which profess to be expositions of the ancient Justinian law.

The disposition in England to depart from the order of Gaius is most conspicuously shown in the great work of Professor Hunter, entitled *A Systematic and Historical Exposition of the Roman Law in the Order of a Code.* Professor Hunter labored with much skill to show that the order of the Roman institutional writers is illogical and unscientific; but it may be a question whether he succeeded in showing that the principles of the law as understood by the Romans can be made more clear to the English student by an arrangement

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which deviates materially from that of the Roman writers. Perhaps the strongest influence which has led the recent English civilians to depreciate the value of the Roman classification is due to the somewhat hypercritical and dogmatic analysis of John Austin. For a considerable time Austin held almost the position of dictator in English legal thought. But it has been shown—especially by Dr. Moyle—that Austin's criticisms of the Roman distinction between the "law of persons" and the "law of things" was due either to a misconception or to a perversion of the meaning which the Romans attached to the words "*persona*" and "*res*," as well as to the difficulty which Austin experienced in making the Roman classification square with his own *a priori* scheme. But the essential question is not whether the Roman system can be made to fit into a modern scheme, but whether its principles can or cannot be most clearly understood by considering them with reference to the scheme which the Roman institutional writers themselves adopted. To this question Mr. Leage has no doubt given the correct answer, in deciding to explain the Roman law as the Roman lawyers understood it, and to follow in his exposition the order of treatment given in the Institutes of Gaius and Justinian.

But Mr. Leage is not, of course, the first of English writers to found the study of the Roman law upon the Institutes. As it has been quite customary in England to assume the lack of any important historical connection between the Roman law and the English common law, the study of the Roman system has been generally pursued, not, as in Germany, as a necessary part of a professional training, but as an ornamental feature of a liberal education, like any other branch of antiquarian research. For this purpose the elementary study of the Institutes has usually been found sufficient, without any exhaustive examination of the Digest. Generally speaking, then, the Institutes have furnished, since the eighteenth century, the chief basis of the academic study of the Roman law in England. Passing over such antiquated tomes as those of Taylor, Wood and Harris, it might be noticed that as early as 1774 Prof. Samuel Hallifax, of Cambridge, published his *Elements of the Roman Civil Law*, which was not only founded upon the Institutes of Justinian, but followed the order of that book in its general divisions and in its subordinate analysis. And during the last fifty years—during which time there has been a marked revival of this study—

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unusual attention has been paid to the Roman institutional writers. Indeed, it might be said that there are few works in any language that surpass, in lucidity and comprehensive treatment, certain comparatively recent commentaries on the Institutes, for example, Poste's edition of the Institutes of Gaius, as well as Sandars' and especially Moyle's edition of the Institutes of Justinian.

The relative merits of Mr. Leage's book must, therefore, be judged upon other considerations than the fact that it is founded upon the institutional writings of Gaius and Justinian, or that it follows the order of treatment given by these ancient authors. Its publication naturally provokes a comparison with two classes of English books already in the field; the one, a class of systematic treatises, represented by Mackenzie and Hunter (and also Ledlie's translation of Sohm's *Institutionen*), which depart from the order of the Roman text-books; the other, a class of expository works, represented by Poste, Sandars and Moyle, which, being expository, follow explicitly the order of the Institutes. The distinctive merit of Mr. Leage's work lies in the fact that it adopts the best features of these two classes, and avoids those features which are sometimes regarded as objectionable. In other words, it is at the same time a systematic treatise and a faithful exposition of Gaius and Justinian. It is a systematic treatise, without abandoning or affecting to correct the scientific arrangement of the Roman jurists. It is a faithful exposition of the Institutes, without adopting the conventional and constrained form of a commentary. In its structure it is a remarkable example of broad synthetic treatment and also of close analytical and logical arrangement of details. It enables the student to comprehend the Roman private law in its entirety, as it was no doubt conceived by Gaius and the other scientific jurists of the Empire. At the same time, by means of a well-elaborated system of notation it sets forth in a clear and accurate manner the fine distinction made by the jurists in their treatment of special branches of the law. Although the exposition of the law is primarily based upon the Institutes, the author has properly supplemented the treatment of certain topics by an appeal to the Digest, as for example in the case of certain subordinate rights of property, the *emphyteusis*, *superficies*, *pignus*, and *hypotheca*. The style of the book is direct, simple and extremely clear. While the use of Latin technical phrases is abundant, the context generally renders the meaning of

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these terms quite apparent. There are very few points discussed by the author to which any serious exceptions might be taken. It might be noticed, however, that when the assertion is made (p. 174) that the "mancipatory" will (*testamentum per æs et libram*) transferred the estate immediately to the heir, that is, before the death of the testator, the writer differs from the majority of authorities, who consider this ancient process as merely a fictitious and conditional conveyance through the forms of "mancipation," to take effect only on the death of the testator. But such disputable points are rare in this treatise. When considered merely as a comprehensive, concise, and clear description of the subject-matter of the Roman Institutes, the book of Mr. Leage will be regarded by all students as an acceptable addition to the literature of this subject.

But there is a larger question suggested by the publication of this work, namely, whether the full educational value to be derived from the study of the Roman law can be obtained from the mere examination, however thorough, of the subject-matter of the Institutes. It is no doubt true that much disciplinary benefit may be received by the prospective lawyer from the training of his mind in the principles set forth in these elementary treatises, especially as embodied in the law of contract. But the greatest significance of the Roman law as a part of an educational curriculum, does not consist in what it may contribute to the professional training of the lawyer. If this were so, its study might better be relegated to the professional school. Moreover, the most liberalizing benefit to be derived from its study cannot be obtained from a mere technical exposition of its subject-matter at the time of Gaius or Justinian, without an examination of that process of development whereby the law of the XII Tables grew into the law of Justinian, and the law of Justinian has become, in its essential principles, a large part of the law of the civilized world. To know what the law *was* at a particular time, is not so important as to know how it *came to be* what it was at each successive period of its growth. The one kind of knowledge is of special interest to the legal antiquary; the other kind of knowledge is of importance to every liberal scholar who would appreciate the full significance of one of the permanent elements of the world's culture. The evolution of the Roman law, from its obscure origin in the customs of the Aryan family and *gens* to its final incorporation into the jurisprudence of modern states, presents one of the most remarkable

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examples which history affords of the continuity of institutional life and the normal processes that govern institutional development. At first, bound by a narrow and rigid conservatism and hampered by the bigoted sanctions of a ceremonial religion, this law became inspired with a thoroughly progressive spirit, expanding with the extension of the Roman territory, supplementing strict rules by equitable principles, and culminating in a scientific system based upon natural justice. The most distinctive feature which one observes in this process of institutional growth is the harmonious blending of conservative and progressive tendencies—the preservation of the old with the development of the new. In the whole course of its evolution there was no radical destruction of what already existed in the Roman system. Legal reforms were effected by addition and not by elimination, by interpretation rather than by formal repeal. The old technical and ceremonial law of the patricians remained with all its traditional sanctity, while the rights of the plebeians were becoming recognized and respected. The ancient *ius civile* continued to be the exclusive possession of the citizen, while the new *ius gentium* afforded equitable protection to the subject foreigner. The letter of the law was, generally speaking, suffered to remain intact, while the spirit of the law was continually expanding through juristic interpretation. The conservative sense of the Roman people thus endured no shock, while the progressive tendencies of each age continued to enlarge and enrich the legal system. The specific methods by which this progress was effected through the coexistence of old forms with new ideas— the "duplication" of legal rights and procedure whereby respect was shown both to ancient prejudices and to modern requirements—are often looked upon as "fictitious" and hence as artificial; whereas, in fact, they are most conspicuous examples of the process involved in all normal and rational growth, and were strictly in harmony with the fundamental laws of evolution—the conservation of the accumulated experiences of the past, and the adjustment of life to the new environment and the increasing needs of the present.

From the great significance of the Roman law as an example of normal institutional growth it seems evident that the highest benefit to be derived from its academic study must be obtained, not so much from the mere study of its technical rules, as from the study of the historical principles involved in its development and its adapta-

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tion to the needs of a progressive society. It is this consideration which suggests the principal criticism to be made upon Mr. Leage's book. Its great defect lies in the very meager discussion devoted to the historical growth of the Roman law. The few pages of introduction given to the "sources of law" are entirely inadequate to explain the progress of the law from the XII Tables to the codification of Justinian, and scarcely a hint is given in the whole book of the historical relations of the Roman law to modern jurisprudence. It must be apparent to every one who seriously considers the kind of education demanded by modern life that the chief justification of retaining an ancient system of thought in a modern course of liberal studies, is based upon its significance as an element of the world's culture, and must be determined by its permanent relations to modern thought and institutions. If the study of the Roman law should form a part of a liberal education, it is not because it is useful as an aid to professional training, not simply because it was the highest product of the Roman mind, but chiefly for the reason that it is one of the great bequests of antiquity to the modern world and hence is one of the permanent factors of civilization. Its greatest significance is due to its place in universal history; and hence the highest benefit to be derived from its academic study can be obtained only by considering it in its historical relations. It is not enough to say that the study of its history is different from and precludes the study of its subject-matter. On the contrary, there is scarcely an important principle contained in the whole body of the Institutes which can be adequately understood except through its history. It is perhaps due to Mr. Leage to say that the historical method is not entirely ignored in his book, for comparisons are sometimes drawn between the law at the time of Gaius and the law at the time of Justinian; but these are not sufficient to enable the student to understand the successive stages by which the "Law of the Roman City" became the "Law of the World"—as expressed in the significant titles given by Professor Sohm to his chapters on the development of the Roman law.

To this general criticism Mr. Leage may reply that his purpose, as clearly expressed in his preface, was merely "to give as simply as possible the subject-matter of the Institutes of Gaius and Justinian." To this one would be compelled to answer that so far as his expressed purpose is concerned his work has been eminently

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successful; but that it is a serious question whether such a purpose is sufficiently broad to meet the highest demands of an educational treatise.

WILLIAM C. MOREY.

A Short History of Roman Law. By PAUL FREDERIC GIRARD, Professor of Roman Law in the Faculty of Law of the University of Paris. Being the first part of his *Manuel de Droit Romain.* Translated (with the consent of the author and with his special additions and corrections) by Augustus Henry Frazer Lefroy, M.A. (Axon), Barrister-at-Law, Professor of Roman Law and General Jurisprudence in the University of Toronto, and John Home Cameron, M.A., Associate Professor of French in University College, Toronto. (Toronto: Canada Law Book Company. 1906. Pp.vi, 220.)

All teachers of the Roman law and of historical jurisprudence will welcome this English version of the general part of Professor Girard's celebrated *Manuel.* That work, first published in 1895, has already run through several editions, and has been received with marked favor in Europe. Doubtless, it deserves the praise of Dr. Moyle, who in, 1903, pronounced it a "masterly treatise." The *Short History,* in the hands of a critical teacher, will prove a helpful supplementary handbook for a class in the Institutes or in historical jurisprudence. It is, of course, based on an independent investigation of the sources, which are minutely cited in the marginal notes; but it is very conservative, and the element of comparison is almost wholly lacking.

The work opens with an admirable discussion of definitions and general principles. For the modern student, it is wisely insisted, the chief advantage of the study of Roman law consists, neither in the material which it provides for the practical understanding of existing laws, nor in the dialectical training afforded, but rather in its incomparable value as an instrument of historical education. The body of the text comprises four chapters. The first deals with the period of the "Kingship" including the Servian reforms; the second, with the "Republic." In general, much deference is paid to the views of Mommsen. For instance, the German historian's well known conclusions regarding the *concilium plebis* are accepted;

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although, as Dr. Botsford is showing, those conclusions are not sustained by an exhaustive analysis of the sources. The development of the law under the "Empire" is treated in Chap. III which has two sections, one on the "principate" and another on the "absolute monarchy." In the fourth chapter, the book closes with a brief and very general account of the "Roman Law in the West."

The work is at once a juridical and a constitutional history of Rome; and the author has defined his subject strictly, there being but slight deviation from the facts of Roman institutions. It is to be regretted that there is not more comparison; that larger questions, such as the sources of equity and the praetor's edict, the origin and primitive significance of the *legis actiones*, or the influences of Roman jurisprudence in England, Germany and America, have not received adequate attention. However, the *Short History* has decided merit; and its value is enhanced by an appendix which includes the whole "general bibliography" which M. Girard has prefixed to his *Manuel*. Though by no means exhaustive, this is an excellent classified list of "original sources," "commentaries," and "auxiliary works of reference."

GEORGE ELLIOTT HOWARD.

The Principles of the Administrative Law of the United States. By FRANK J. GOODNOW, LL.D. (New York: G. P. Putman's Sons. 1905. Pp. xxvii, 480.) *Le droit administratif; edition française par l'auteur.* Otto Mayer. 4 vols. *Bibliothèque internationale de droit public.* (Paris: *Giard et Brière*, 1903, 1904, 1905, 1906.)

Two treatises with which the students of public law have been familiar for a number of years make their appearance in a new garb; Goodnow's *Administrative Law* in a condensed and revised edition, and Otto Mayer's *Deutsches Verwaltungsrecht* in a French translation.

Professor Goodnow has eliminated the comparative features of his earlier work and has made a corresponding change in the title of the book. This will enhance the usefulness of the treatise as a college text-book; for to the ordinary student an extended and yet necessarily inadequate study of three foreign systems of administration is of problematical value. At the same time, the young and

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only half recognized department of jurisprudence which goes by the name of administrative law has taken that name from foreign systems, and while in the main its substance is English common law and American constitutional law, at least one of its fundamental ideas, that of the separation of powers, has been inspired by French theory, and there are few branches of law in which the parallels and contrasts between the Anglo-American and the continental systems are more striking and instructive. Under these circumstances, the comparative method of the older work should not have been entirely sacrificed to the requirements of condensation.

In the twelve years that have elapsed since the appearance of the first edition, there has been considerable movement in the administrative or organization side of the subject. The principle of civil service reform (it is gratifying to note that Mr. Goodnow has not adopted the term "civil service" as designating the system of its reform) has been greatly extended, both in the Federal government and in the States and cities; the legislative control of methods of nomination through primary elections has become an established part of our public law, and numerous expriments have been made in municipal organization, especially in the very liberal grants of charter autonomy. To these three subjects Mr. Goodnow devotes either new or greatly enlarged chapters.

In the matter of legal principles, tendencies of development are naturally less marked, and very often indeed it is quite impossible to speak of any tendency. Still there have been within the last decade important judicial decisions upon the fundamental problems of administrative law, viz: the conclusiveness of administrative determinations, and the legality of administrative enforcements. Upon these points Mr. Goodnow has likewise considerable new matter (see especially pp. 334–339, 351–366, and 394–398); but the treatment is less satisfactory, owing largely to the unsettled state of the authorities, which make it impossible to deal with the matter adequately without going very much into detail.

Mr. Goodnow in the present treatise recurs to a fundamental distinction which he first put forward and developed in a separate volume, namely, that between politics and administration. According to this distinction, politics, the expression of the will of the state, is the proper field for the action of party contest, while administration, the execution of the will of the state, should be impartial, and,

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in order to attain that spirit, be invested with judicial guarantees of independence.

But neither the practice nor the theory of any system of government sanctions the idea of an administration absolutely divorced from politics. On the contrary, it is everywhere recognized that within the sphere of administration as well as in legislation there is a legitimate scope for differences of policy. This fact finds its legal expression both in the institution of political heads for the main executive departments and in the creation of discretionary powers. Certain branches of administration, notably those of public improvements and of education, leave a great deal of public policy to be determined by executive authorities, others, as *e. g.*, the administration of the election laws, almost nothing; in the great fields of revenue and police, while the policy is supposed to be settled by legislation, administrative discretion will inevitably determine to a considerable extent the manner of execution and enforcement of the laws.

It is true on the other hand that much administration in every department of government is nothing but the judicial application of principles of public law to individual cases, and the courts compel in these matters the conformity of administration to law. In these cases there is either no discretion at all, and, therefore, no scope for policy, or the discretion is judicially reviewable, at least with a view to compelling the fairness of its exercise. The true contrast, therefore, ought to be, not between politics and administration, but between policy and justice as two different aspect of administration.

It is important to insist upon this distinction for the purpose of making out the province of administrative law. In so far as administration is a matter of policy, it is a branch of political science; in so far as it is a matter of power, duty or individual right, it is a branch of jurisprudence. A description of a particular system of administrative organization and of the legislative regulation of the various branches of governmental activity contains much more political science than law. The German and French university courses on administrative law and many standard text-books combine descriptive matter with exposition of legal principle, and Mr. Goodnow does the same, at least as far as organization is concerned, while Professor Mayer eliminates descriptive matter entirely. In Germany and France the combination is sanctioned by long usage. In England

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and America legal science, perhaps rather too narrowly, treats the statutory regulation of governmental activity as lying outside of its province, and confines itself to the discussion of principles that can be evolved on the basis of reason and judical authority. Arbitrary as this limitation may be, we shall not in this country get administrative law recognized as one of the legitimate and coördinate branches of jurisprudence, until we lay the main stress upon demonstrating that it contains a body of principles of constitutional and common law and of statutory construction in which the normal rules of law are modified by the interests and privileges of the public as a party to legal relations.

Professor Mayer undertakes to systematize these principles peculiar to the law of public relations. After explaining the principle of the rule of law in the modern state, the nature of the executive power, of administrative acts, of the public rights of individuals and of administrative remedies, he divides his subject into the following main topics: the police power (orders, license, penalties, compulsion), the taxing power, public property (eminent domain, public use, licenses and franchises, easements), the obligations of the public law (official relation, burdens and services, contracts, damages and compensation), and public corporations. This enumeration of topics shows a much more comprehensive mapping out of the field of public law than we usually comprehend under the term, administrative law, or than Professor Goodnow attempts to cover. But they are as live topics in America as in Germany.

When we treat the administrative law of Germany and France as a body of principles foreign to our ideas and unsuited to our conditions, we think above all of the systems of administrative courts to which questions of public law (but by no means all of them) are committed on the continent of Europe. The division of jurisdictions between the regular civil and criminal courts on the one side and the administrative courts on the other, is generally conceded to be more or less conventional, and by no means coincident with the line of division between private and public law. In this phase of the continental systems the American student cannot be expected to take a particular interest.

But there are other questions of fundamental importance which every system of administrative law is called upon to deal with. Conspicuous among these is the question whether an issue between

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the individual and the government is judicially reviewable or finally disposed of by administrative action. The strong assertion of judicial control in England and America has prevented the right to a day in court from becoming one of the claims notable in constitutional history, and the importance of the right does not always seem to have sufficiently impressed the courts when it was deemed desirable to further the public welfare by strengthening the arms of the administration; not until the discussion of the new rate act did this right attain to the dignity of a dominating issue. In this matter we might profit considerably from the study of the German system.

In America the most important questions of administrative law present constitutional problems. In Germany and France the differentiation of the administrative from constitutional law offers little difficulty. Constitutional law, as understood in those countries, is chiefly concerned with questions which cannot come before the courts; questions touching legislative power, the chief executive, ministerial responsibility, etc.; administrative law sets in where public power comes in contact with individual right. The absolute subordination of public authority as well as of private right to the legislative power is unquestioned in other systems than ours, and the legality of any kind of statutory regulation and enactment, therefore, beyond discussion. In America, of course, the first questions always is whether the statute can stand the test of constitutional principle. Our administrative law may, therefore, be constitutional law, or it may be common law, or it may be matter of statutory construction.

If, notwithstanding this fundamental difference, a German treatise on public law can be of value and interest to the American student, even from a constitutional point of view, the reason is that executive power in Germany is not as closely circumscribed by statute law as it is in America. The comprehensive delegation of the police power in the narrower sense of the term to the executive authority enables the courts to control the validity of many regulations which with us are matters of statutory enactment. Moreover, the principle of the civil law—unknown to the common law—that the state can be held liable for injury done to private right, makes it possible to accomplish results which we reach only through the judicial enforcement of limitations upon the legislative power. Repeatedly, German courts have awarded damages against the government for invasions of

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property in the absence of express legislative provisions for compensation, on the theory that the government cannot be presumed to have intended to sacrifice private rights to public interests. There are similar adjudications in this country in jurisdictions where the state or government allows itself to be sued (see *e.g.*, U. S. *v.* Great Falls Mfg. Co., 112 U. S., 645); but ordinarily we proceed upon the assumption that the legislative act authorizing the invasion is null and void, and the remedy in damages goes only against a possibly irresponsible officer. A comparison between the extent of protection of vested rights under the German and the American system is instructive and not always favorable to our law.

The criticism to which Mayer's book is open applies to the German method of systematic jurisprudence in general. The treatise is primarily an attempt to construct a scientific system, only secondarily and quite incidentally an exposition of actual law. There is no effort to present in detail the results of legislation and adjudication in building up a great body of rules and principles; such material is in the main to be found only in the references drawn to illustrate the correctness of the author's juristic concepts. The American reader would have preferred a presentation of the German law, arranged and explained in accordance with the author's theories, to a presentation of those theories, illustrated by occasional references to the actual law. But the teatise in its present form is addressed to French readers, and German jurisprudence seems to be in high favor with the modern French school. Professor Mayer is peculiarly well qualified to act as interpreter, for as professor at the University of Strassburg, the capital of Alsace, a territory still governed by the principles of French public law, he found occasion to acquaint himself with the French system, and his *Theory of French Administrative Law*, published in 1868, is probably the best systematic account of a branch of jurisprudence which may be said to have been created by the French.

Mr. Mayer has been his own translator, and the French version seems to be distinguished by the same ease and elegance of diction that is characteristic of the German original.

ERNEST FREUND.

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Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century. By A. V. DICEY, K.C., B.C.L., LL.D. (London: Macmillan and Company. 1905. Pp. xx, 503.)

This is a book presenting not so much new facts as a new and masterly analysis and interpretation of facts, such as appears from time to time in many cases from British writers. The author belongs to the class of publicists who can discuss large political problems for serious students, in a clear and interesting style, free both from the vagueness of elementary works and from the pedantry of technical treatises. He is already known in this country as the author of an *Introduction to the Law of the* [English] *Constitution*; and the present work will rank with that and the writings of Maine, Sidgwick and Bryce.

A course of lectures delivered at the Harvard Law School in 1898 form the basis of the book; but these have been modified and altered in subsequent presentation at Oxford University. Three opening lectures discuss the relation between law and public opinion, the characteristics of law-making opinion in England, and the influence of democracy on legislation. These prepare the way for the central theme, an analysis of the leading tendencies of English legislation during the past century. Three periods are marked off, in each of which the main current of legislation is clearly shown to be in accordance with certain definite principles: first, the Blackstonian period of Old Troyism from 1800 to 1830, marked by legislative quiescence; second, the period of Benthamism from 1830 to 1870, marked by profound legislative changes in accordance with individualistic ideals; and third, the period of collectivism, from 1865 to 1900, marked by the same Benthamite method of legislative activity, but by an antithetic socialistic or collectivistic ideal. This central discussion is followed by two chapters on counter-currents and cross-currents of legislative opinions and on illustrative tendencies in judicial legislation during the period under review. A final lecture discusses the relation between legislative opinion and the general tendencies of English thought in other spheres and in the writings of notable individuals, such as Harriet Martineau, Charles Dickens and John Stuart Mill.

It is the analysis of the three main currents of legislation which

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form the most interesting and valuable part of the work. With admirable skill and clearness, the most vital and significant measures are detached from the voluminous mass of statutory legislation; and are shown to belong, perhaps unconsciously, to one or other of the steady tides of opinion which prevailed during each of the three periods. While statutes of considerable importance were passed in the first period, they are seen to be either reactionary or caused by different purposes than the later measures. In the second period the various acts for the transfer of political power, the extension of individual liberty, and the protection of rights are shown to have developed from the definite ideas and systematic programme of reform outlined by Bentham. In the third period there is an absence of any recognized leader of opinion, and of logical completeness in the movement, which contrasts sharply with the preceding era. And in fact there is a distinct aversion toward accepting the systematic views of the Socialists. Nevertheless, the trend of legislation is steadily toward that increased state activity to which Mr. Dicey gives the somewhat vague title of collectivism.

As an illustration of cross-currents of legislative opinion, deflecting from the main course, Mr. Dicey discusses the history of ecclesiastical legislation from 1830 to 1900. And as an example of the tendencies of judicial legislation, he traces the development of law as to the property of married women, with reference to the inter-relations between judicial and parliamentary legislation.

It is with hesitation that one ventures to point out some deficiencies in a book by such a recognized authority, which does so much as this volume. But to the writer of this review it seems in some respects to fail to meet the promise of its title, and in some of its views to open the way to queries as to their soundness.

The book is a most excellent analysis of the trend of *legislative opinion;* and shows how the prevailing views in legislation accord with the writings of prominent leaders of thought. But it just fails to analyze the elusive element of *public opinion,* which bridges the gap between the ideas of the writers and the acts of the legislature; and yet this analysis the title of the book gives us a right to expect.

Perhaps some of the difficulty arises from the author's failure to define clearly what is meant by public opinion. His only specific suggestion as to what is meant by this term is inadequate. On p. 10 he speaks of it as "the ideas as to legislation held . . . by the

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majority of those citizens who have at a given moment taken an active part in public life." And he follows this with the statement, as an obvious conclusion, "that the public opinion which governs a country is the opinion of the sovereign, whether the sovereign is a monarch, an aristocracy or the mass of the people."

Under such an interpretation there is nothing unusual in a close relation between law and public opinion. Not only in England, but in every country and at all times, law would necessarily agree with public opinion. The author's discussion of the ideas of Jeremy Bentham and John Stuart Mill would have no place in the volume; and he should rather have analyzed the views of the parliamentary leaders of the century.

But Mr. Dicey's treatment shows that he does not act on his own definition. And the ideas of Bentham, Mill and the other writers have a proper place in the discussion. We can only wish he had taken another step, by giving a satisfactory definition of the vague term public opinion; and had then shown how the ideas of the writers became vitalized by public opinion, and how this in turn influenced legislation. We might also look for some explanation as to why the highly individualistic views of so prominent a writer as Herbert Spencer have apparently not affected public opinion, and more clearly have been ignored in the trend of legislation during the third period.

All of this is a task beyond the limits of a review; and it may be admitted beyond the powers of the reviewer. But it may not be amiss to point out the problem suggested by Mr. Dicey's lectures; and to express the belief that it is one on which he might have thrown much light had he thoroughly appreciated the implications of his subject.

Some exceptions may also be taken to Mr. Dicey's view as to the relation between the democratic movement and legislative tendencies. He has done a service in criticising the view that democratic governments always favor the same kind of legislation. But it is surely of more significance than he admits that the years which mark the transitions from one main current of legislation to another are very close to the great changes in the English constitution during the nineteenth century. The changes in government are themselves the result of public opinion; but it would seem that they also in turn affect public opinion on other questions. And while public opinion

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must not be considered simply as the ideas of those who held political power, there seems evidence for believing that it is affected by the political system. Certainly in England legislative policy under the ten pound household suffrage was markedly different from the legislative policies under the earlier franchise and under the more democratic system since the second Reform Act.

Attention may also be called to another significant feature of the trend to collectivism, which is not mentioned by Mr. Dicey. That is its influence on the political parties. The new collectivistic tendency is out of harmony with the old principles of both the Conservative and Liberal parties. Yet both parties have enacted much collectivistic legislation; and the movement has gained ground whichever party has been in power. Here is evidence of a broader tide of public opinion, which sweeps over the party divisions, and for which at least a partial cause would seem to be the more democratic suffrage of the later decades.

Such points of criticism do not, however, detract from the value of Mr. Dicey's book. It is indeed not the least of its merits that it is likely to make its readers think and to provoke discussion on the various ideas presented. And the relations between law and public opinion is certainly a subject which deserves much attention and discussion.

JOHN A. FAIRLIE.

Le Droit International: Les Principes, Les Théories, Les Faits. Par ERNEST NYS, Conseiller à la Cour d'Appel, Professeur à l'Université de Bruxelles. (Bruxelles: Alfred Castaigne. Paris; Albert Fontemoing. Tome I, pp. 546. 1904. Tome II, pp. 432. 1905.)

These two volumes are the first instalments of what is probably the most elaborate and comprehensive treatise on international law that has been undertaken in recent years. M. Nys is already well known as the author of several books, as an editor, and as a contributor to the leading international law reviews. The work now under consideration aims to be a systematic treatise covering the whole field of international law. Some idea as to its scope may be formed from the statement that the two volumes already out, cover only about one-third of the entire ground. The first volume con-

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tains an introductory chapter on the origin of international law; nine chapters on fundamental conceptions, definitions and literature; four chapters on states, including an elaborate classification; and eight chapters on territory and territorial waters. The second volume has three chapters on the acquisition of territory, and on the various kinds of control exercised over dependent territory; four chapters on rivers, lakes and high seas; fourteen chapters on the essential rights of states; and seven chapters on the representatives and organs of states in their international relations.

In reviewing these volumes it will perhaps be found best to discuss the author's general point of view rather than to attempt to give a statement of his views on a number of separate topics.

In his chapter on the "positive character of international law," he gives an excellent discussion of an old controversy. As might be expected, he rejects the view of the analytical school that the sole subject-matter of jurisprudence is positive law; that is, law which, in its ultimate analysis, derives its force from a command issued by a sovereign authority and is enforced by a sanction. He strongly holds to the view of the historical school that in the chronological order custom is always anterior to law, that custom rests on precedents, and that in primitive organizations of society the decision of disputes is the act not of magistrates clothed with authority, but of arbiters chosen by the parties. He holds that international law, like private law in all primitive communities, may exist in the absence of a legislative authority and in the absence of a regularly constituted court charged with its enforcement, although in The Hague Court we approach very near to this latter requirement of the Austinians. As for a sanction, international law has a very powerful sanction in public opinion.

In his discussion of the sources of international law, M. Nys departs quite widely from the conventional treatment of that subject to be found in the writings of English and American publicists. He recognizes only two sources of international law. According to the general doctrine, he says, custom and treaties constitute the two modes of formation of international law; they are the sources of this law, primary sources according to some, secondary sources according to others. Throughout the discussion he lays great emphasis upon custom, the creative power of which is not exhausted in the law of nations as it has been to a large extent in private law. In regard to

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the unilateral acts of states, their laws, edicts, and ordinances, he is emphatic in the statement that they are not sources of international law. The fact that a number of states, that the whole body of states even, promulgate identical orders on the same subject does not alter the case. Even here the true source of the rule of law is the custom which these orders merely affirm.

The important part played by courts in the formation or the expression of custom, our author admits, cannot be denied. As a rule, he says, they are not bound by earlier decisions, but it is none the less incontestable that a series of concurring decisions rendered by the courts of different countries on a question of international law leads to the conclusion that a rule of law exists. In certain states the rôle of courts of justice in the affirmation or even in the establishment of customs is more extended than in others, and, in this connection, there is no comparison between the countries dominated by the Roman theories and the countries where the English common law has developed. The decision of prize courts, he contends, are not sources of international law at all, however important they may be in the determination of the rules of international maritime law which a given state observes in regard to other states. In discussing the decisions of courts of arbitration, he quotes the dictum of James Lorimer: "There are no international judges; there can be no international judgments." He raises this objection to arbitral decisions, that the convention under which the arbiters are to act often results from a preliminary compromise between the interests concerned and not from an agreement on the principles or on the law governing the relations of the parties. The decisions of such tribunals are not sources of international law; they decide cases; they serve to make known the state of international law; they directly declare custom, but they go no further. The force of an arbitral sentence rests rather on the reasoning on which it is based than on the decision itself. Such an argument will not readily appeal to a student of the common law.

M. Nys shows a remarkably familiarity with the literature of the subject. In connection with almost every topic he quotes at length the opinions of other writers taken from books, monographs, and reviews, in French, English, German, Spanish and Italian. He devotes over a hundred pages of the first volume (pp. 213–328) to brief bibliographical and critical notes on authors from the begin-

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nings of the modern science of international law to the present time, mentioning almost every one of importance, with a list of his writings.

The English or American reader will be struck with the fact that, with the exception of treaties, the author rarely cites official documents or cases. This fact is, of course, explained by what has already been said of his views as to the sources of international law. While his discussions of some topics are exhaustive, his contributions are so far not great, his favorite method of elucidating a subject being to present a symposium of the views of leading authorities, a method which sometimes leaves the reader in doubt as to M. Nys' own conclusions. The quotations fill far too large a part of the volumes. The work gives evidence of thorough scholarship, if not of originality, and, as a discussion of the literature of the subject it will hold an easy supremacy over all works now in the field. As the development of international law has of late been mainly in the part of the subject relating to the rights and duties of neutrals, which does not fall within the scope of the present volumes, an accurate estimate of the work cannot be formed until the remaining volumes appear.

JOHN HOLLADAY LATANÉ.

International Law with Illustrative Cases. By EDWIN MAXEY, M.Dip., D.C.L., LL.D. (St. Louis: F. H. Thomas Law Book Company. 1906. Pp. 797.)

This volume is mainly interesting as an attempt by an experienced teacher of international law to construct a text-book on this subject which shall conform to the needs of the class-room in providing the student with a ready access to leading cases. This is done by incorporating a number of cases and placing them in their appropriate chapter-settings in the text.

This attempt can hardly be considered successful. The cases (68 in number) are too few for the needs of the student, and are not always well selected. Thus there is but one case (Vavasseur *v.* Krupp) on the immunities of foreign sovereigns, and one (Taylor *v.* Best) on the immunities of diplomatic agents, with another (Dillon's Case) on the immunities of consuls. There is one (Exchange *v.* McFadden) on the immunities of public vessels, and only one (Wildenhus' Case) which bears on the custom now commonly observed of

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exempting foreign merchant ships from the jurisdiction of the local courts when acts committed on board affect only the foreign vessel and its crew, provided these are not of such a character as to disturb the peace of the port. Indeed, there is no reference in the body of the text whatever to this so-called "French Rule." The only case relating to the subject of piracy is that of United States *v.* Smith, and there is no reference, either in the text or by way of cases, to the important question as to whether rebels or insurgents may be treated as pirates.

On the other hand, there are six cases (including United States *v.* Kagama on the status of American Indians—a practical waste of 12 pages) on "National Character and Domicile," four on "Treaties," and nine on the important subject of "Contraband."

The cases given are not properly edited. They are not dated, there is no indication of omissions or dissenting opinions, and they are set in the same type as the body of the text. They are not always well arranged. Thus the case of *The Rapid* on the "Effect of the Commencement of War" is given a place along with the cases on the immunities of diplomatic agents and consuls at the end of a chapter on "Intercourse;" the United States *v.* Smith (a case on piracy) is found following a chapter on the "Right of Belligerents over Property of the Enemy;" and the cases of *The Carolina* and *The Atlanta* on "Unneutral Service" are classed under the head of "Contraband."

What the present-day student of international law really needs is not so much a mere collection of leading cases in addition to the text, but a source book containing a selection of documents (including a digest of leading cases)—a sort of miniature Moore's or Wharton's *Digest of International Law*, with an international instead of a national scope in respect to choice of materials. The decisions of judges in themselves, however numerous, do not sufficiently cover the whole field of international law which is essentially based upon custom or international practice. Besides, they often indicate a national bias and much that they contain is mere *obiter dicta*.

Whether judged as a text-book or as a treatise on international law, this volume contains many faults both of omission and commission. Among the former, the following may be noted: there is no adequate treatment of piracy; nor of the difficult and complex subject of intervention (to which the author devotes less than four pages); nor of the important subject of arbitration (to which, after

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stating that it merits "a most careful examination," the author gives five pages, two of these being devoted to arbitration among the Greeks the "Great Design" of Henry IV., Bentham's plan, and a long citation from Field's *Outline of an International Code;* nor of the fitting out, sale, or exportation of armed vessels intended for belligerent service, etc. The whole subject of "War" is inadequately dealt with in accordance with the author's "conviction," as expressed in the preface, that "the real interests of nations are in peace rather than war, and that time can be more profitably spent in a study of the means of avoiding strife than in elaborating the rules for regulating it."

Of positive errors, the following examples may be given: the author seems to think that The Hague Conference of 1899 provided the nations with an international court "for the purpose of determining upon violations of international law" and "controversies between nations," and that the North Sea Incident was settled by The Hague Tribunal (see pp. 2, 25 and 31); the statement (on p. 398) that "the rules of war require that non-combatants should be permitted to withdraw" in case of bombardment of fortified towns, is more than doubtful; Art. 25 of The Hague Convention does not forbid the bombardment of unfortified coast towns, as stated on p. 401; the law of enlistment (on p. 538) is not correctly stated; the "rather recent rule" to the effect that when "warships of opposing belligerents chance to be found in the same neutral port, it is the duty of the neutral to see that those of one do not leave until twenty-four hours has elapsed since the departure of those of the other," dates from the eighteenth century (see Hall, 3d ed., note on p. 631); there is a serious misprint on page 541 which makes it appear that the author thinks "it is *not* the duty of the neutral to prevent its ports being used by the belligerent for the purpose of bringing in and selling its prizes;" it is charitable to suppose that the reference (on p. 567) to Calvo as the "great Swiss international law writer" is also a misprint; it was not the 375 cases of *beer* on board the *Cheltenham* (see p. 571) which led to the confiscation of that vessel and its cargo during the Russo-Japanese war, but the fact that she had repeatedly conveyed large quantities of railway material to Fusan, Korea, for the use of the Seoul-Fusan Railway, then being used for military purposes by the Japanese Government (see *London Times* [weekly] for Sept. 16, 1904, p. 607); the author fails to make a clear distinction between contraband and unneutral service (for which latter kinds of illegal acts, he uses the

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meaningless term *quasi-contraband goods*—see pp. 573 ff), and it can hardly be admitted that a custom which "is still opposed by England, may safely be said to be an established principle of international law." Our author makes the statement (p. 714) *à propos* of the rule adopted by the First and Second Armed Neutrality, that the "declaration of the officer commanding a vessel in charge of merchantmen should be conclusive as to the innocence of the traffic in which they were engaged and that no search should be permitted" under such circumstances.

Portions of the work are, however, not wholly without merit. For example, the chapters on Sources of International Law, National Character and Domicile, Independence, Intercourse, and Enemy Character, although they contain nothing new, are safe and sound. Especially sound is the distinction between domicile and residence (on p. 62), that between sovereignty and independence (on p. 85) and the section on Equality of States (pp. 90–95). It was a good idea to incorporate portions of The Hague Code in the text, but a mistake to place any of these Regulations Respecting the Laws and Customs of War on Land in a section headed Warfare on Sea (see pp. 400–404). It was also a good idea to draw illustrations from the Russo-Japanese War, although it is surprising that a work which was apparently written during the progress of that war should not contain more such examples. The closing chapters on The Need of an International Conference are distinctly good, but it is difficult to see why they should be inserted in a text-book.

On the whole, it must be said that this work is unsatisfactory, from whatever point of view it be regarded. It is immature, inaccurate, and incomplete. It lacks perspective as a whole, and a proper sense of proportion in its parts. There are few references and no footnotes. The style frequently lacks dignity. Many examples of such lack of dignity might be given, but the following may suffice: "To the international law of the present time, all persons of the enemy do not look alike" (p. 414); and "the purpose of these [treaties] was clearly to starve sense into France" (p. 566). It is to be regretted that the author did not devote more time, care, and thought to the preparation of this work which might otherwise be of some service, at least as a text-book.

Amos S. Hershey.

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China in Law and Commerce. By T. R. JERNIGAN. (New York: The Macmillan Company. 1905. Pp. vii, 408.)

Three years ago, upon the conclusion of his term as American Consul General in China, Mr. Jernigan prepared for the press in Shanghai a volume, entitled *China's Business Methods and Policy*, a collection of papers on various topics relating to the intercourse of foreigners in China. The book before us, while rather less general in its scope, deals with the same subjects in a series of fifteen chapters that have been entirely rewritten and rearranged, greatly to the improvement of the work. It is compiled by one who, though evidently unacquainted with the language, has enjoyed a considerable experience at first hand with Chinese officials and business men and its statements and conclusions are for the most part sound as well as free from prejudice. No book of anything like the same value upon the practical operation of customary law in China has appeared in recent years, nor is there any other work so accessible and conveniently condensed that can be recommended to the intelligent student of Chinese conditions.

For this reason and because the underlying principles of Chinese polity are seldom rightly comprehended, it is worth while to examine some of the author's statements and reflections. In following the latter it is gratifying to observe a spirit of fairness toward a people that while obviously falling far short of their own high standards do not, in his estimation, appear—as we are so frequently told by travelers—to be decadent or beyond the influence of thoroughgoing reforms that may in a generation completely transform the nation. The extraordinary endurance of Chinese institutions is doubtless the result of causes too complex and far-reaching to be considered here, and some of these which are physical and geographical do not seem to have received the analysis they deserve in the introductory chapter on Physical Features and Origins, but the author rightly emphasizes the controlling influence of custom not only in mitigating despotism, but in maintaining under an autocracy a singularly democratic community. Nowhere in Asia have democratic ordinances survived beyond the primitive social stage. A despot at the head of society is the desire and ideal of Asiatics everywhere. But in no part of the world have despots been so successfully made to understand the limits set to their power. There are instances in plenty, of course, wherein they have abused their power, but the

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Chinese can refer with some complacency to a longer period of the kind of rule of which they approved than any nation known to history. Their idea seems to have been that rather than to trust the proletariat with a share in the administration "it was safer for the general interest to put an Emperor on his good behavior, and cause him to feel that the respect which he showed for himself would be the measure of the respect which his subjects would show for him. The old law-givers have, therefore, from the foundation of the empire, made it a first maxim that the Emperor was the father of his people, and not a master placed on the throne to be served by slaves. An Emperor may be a great warrior, an able politician, and a learned prince, but these and similar qualities do not fix him in the affection of his subjects by any means as surely and firmly as governing benevolently and justly."

This theory of rule will be criticised as the embodiment of the patriarchal plan of rulership common to primitive communities. It is not unlikely that the statecraft of China, like its language, will be found by students of sociology to be only rudimentary in its development; its main interest, however, lies in the fact that the system on the whole performs its functions admirably. China today is miserable through no great fault in her political structure but because she has been terribly mismanaged by a clan of foreigners who have persistently and intentionally corrupted the best elements in the empire. What she needs, the author intimates, is not a new constitution of a European type but a return to her old order under native administrators whose instinctive appreciation of the value of their ancient system of checks and balances would reduce the present derangement to the methods best suited to the Chinese people. The attitude of her ablest men today exhibits abundant willingnness to avail themselves of all the implements of modern industrial life whereby they expect to meet the competition of Western peoples, but in political or ethical philosophy they have yet to be convinced that they are greatly inferior to Europeans. This view is important and needs to be impressed upon the minds of our publicists in whose opinion China is bound to follow in the footsteps of Japan. Whether it would be wise for her to do so or not is merely an academic question; the fact remains that in view of her immense pride in the originality and suitability of her own institutions such a fundamental change as the island empire has voluntarily inaugurated within the past half-century would be impossible in China.

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The main reason for this is that government in China already rests upon the will of the governed. While it is true that their affairs are for the moment badly mismanaged they feel that they are competent ultimately to rectify existing abuses if they can be rid of the fear of overwhelming forces from abroad; and on this account we see their statesmen chiefly interested in creating a sufficient military array to resist foreign aggressions. And their confidence does not appear to be unfounded when we realize that the common people have been trained for centuries in the management of their local and personal affairs. The principle of mutual responsibility, under which each unit is made accountable to the group in which it is contained, has taught them how to live with the least possible interference from authorities above them. Here, we are told, law is founded on custom, and "as the building of the governmental fabric proceeds from the family unit and not from the central authority at Peking, it is more apparent, therefore, why custom is so influential a factor in all things Chinese. The power conferred upon the *paterfamilias* or the village headman by the patriarchal principle is so mitigated by the principle of personal accountability as to result in little hardship to the individual. In like manner the *chi-hsien*, or district magistrate, the lowest grade officer in the civil hierachy, who is invested with both criminal and civil functions, is held responsible for every disturbance in his *hsien*, and like a wise schoolmaster he seldom fails to maintain order by a shrewd mixture of authority and *bonhomie*. Government in this way is conducted with comparatively slight cost and the minimum of friction. The people are trained to consider peace and good order for their own benefit, not a thing of only theoretical or moral excellence. Probably this is as high a warrant for the regulation of society as most common people are able to comprehend.

Mr. Jernigan's chapters on the code and administration of law in China are of great interest. In no country, he declares, does the judgment of a competent court establish a precedent of greater binding force than in this empire. But precedent in a normally conservative community has become a tyrant, and the chief need is for a few original jurists who will both modify and expand the application of legal principles. The essentially democratic nature of the Chinese state is, however, chiefly evident in the operation of its commercial institutions which sometimes transcend, or rather, usurp the law-making functions of the government. The power of their guilds and

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various associations is often sufficient to set the imperial authority at defiance, though, it must be added, the law-abiding instinct of the people generally restrains these organizations from becoming contumacious. In no country of the world are sound business maxims more rigorously maintained or a better *morale* established. The sanctity of a Chinese merchant's word is already pretty well known abroad, but it is interesting to observe that this business probity is due to no lofty morality but to the firm conviction that transactions can never be profitable in the long run unless credit is kept inviolable; and credit is of course based on honest dealing. Private concerns preserve the integrity of all individuals in their employ by methods of their own, even while the government is conducted by notoriously corrupt officials. Here is a new instance of the ability of the people as a whole to amend their public institutions; they must be convinced that good government is cheaper than bad and that the example of the guild may be wisely applied to the central and provincial executives. Energy expended upon moral suasion and the sin of stealing is wasted in China, but once satisfied that a governor's *vamen* may be conducted as effectively as a banker's guild in Shensi, and the Chinaman might show as pure politics as anybody in the world.

In his concluding three chapters on methods of transit in China the author is rather less convincing in his arrangement of this matter than elsewhere in his work. This is probably due mainly to the difficulty of compressing all that ought to be said in so brief a space. One would be glad to find here a sufficient *résumé* of recent railway history there, to understand the situation at the present moment, but the story is not made very clear. Perhaps it can never be told without such reflections upon the probity of the "Christian" nations as to arouse the wrath of all his readers. To some of these it will be news that all honesty is not on one side only nor all dishonesty on the other.

F. W. WILLIAMS.

Les droits legislatifs du President des États-Unis d'Amerique. Par HENRI BOSC. (Paris: Arthur Rousseau. 1906. Pp. viii, 286.)

This monograph was written as a thesis for the doctorate in the University of Aix-Marseilles. In point of scholarship, fairness of treatment and freedom from error it is distinctly superior to the aver-

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age foreign dissertation on American Institutions. M. Bosc divides his work into two parts; the first, dealing with the positive rôle of the President in the making of law (*Le droit de message*); the second, with his negative function (*Le droit de veto*), the two being preceded by an introductory discussion of the theory of the separation of powers as that theory was understood by the framers of the Federal Constitution in 1787. The influence of the writings of Locke and Montesquieu in determining the action of the Convention on this point is discussed at length with evidence of a disposition natural to Frenchmen to overestimate Montesquieu's influence (compare Merriam, *American Political Theories*, p. 91). He points out also the extent to which the various European constitutions have imitated the American principle and in what particulars they have departed from it. While the Americans have distributed the powers of government among three departments, each of which is perfectly equal and coördinate with the others, the Europeans have proceeded on the theory of the inequality of departments and have given the position of supremacy to the legislature (p. 29). The Americans rather followed Montesquieu in this respect, while the Europeans have copied Locke and Rousseau in treating the executive more as an assistant to, than as an equal of, the legislature.

M. Bosc compares the power of the President to initiate legislative projects with that of European executives where the parliamentary system prevails and where, consequently, the executive is represented in the chambers by ministers. On account of the absence of the President's ministers from Congress, his share in the initiation of legislative measures is inconsiderable. The author criticises the view of those American writers who maintain that the President's right of message is a right of initiative and affirms that such a right can exist only when the executive has the power to compel the legislature to take into consideration the measures laid before it by his direction (p. 76). He then discusses the various indirect means through which the President may and does influence the course of legislation; chief of which is his appeal to influential members representing the majority party (p. 122). Other means pointed out are his power of appointment, appeals to public opinion and threats of disapproval.

In a chapter, entitled Some Possible Modifications of the American System, M. Bosc discusses the Pendleton Bill of 1881, which proposed to confer upon members of the Cabinet the privilege of occupying

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seats in Congress with the privilege of giving information in the course of the debates. He thinks that the enactment of the Pendleton Bill into law would have introduced certain advantages into the American system, but that it would also have been attended by inconveniences. The introduction of the parliamentary system would have so radically changed the working of the Constitution as to endanger its other parts. Thus he says: "Nous ne croyons donc pas, qu'il eût été bon que le bill Pendleton fût voté; il ne nous semble point qu'une pareille réforme soit désirable. La Constitution Americaine forme un tout harmonieux et symétrique dont il est impossible de modifier une partie sans mettre en péril le valeur de l'ensemble. Que les États-Unis la remplacent par une Constitution fondée sur le principe parlementaire c'est possible, et ce serait peut-être meilleur pour eux, mais ils ne peuvent espèrer combiner les avantages respectifs des deux grands systémes de Constitution" (p. 156). In Part II of his monograph M. Bosc discusses the veto power. After examining the views of various writers on the question whether the veto power is legislative or executive in its nature, he concludes that it is legislative, and that in exercising this power the President acts as a third branch of Congress (p. 162). On most points discussed in the second part of his work the author, of course, found it impossible to contribute much information beyond that contained in Edward G. Mason's monograph, which had already thoroughly covered the field. On the nature of the American veto as compared with that of the European executive, however, he makes a distinct contribution to the discussion of the subject.

J. W. GARNER.

American Railroad Rates. By WALTER C. NOYES. (Boston: Little, Brown and Company. 1905. Pp. 277.)

The widely different opinions on the subject of the public regulation of railroad rates, which is really a part of the broader question of the relation of so-called public service corporations to the State, are illustrated by comparison of this book with Parsons' *Heart of the Railroad Problem*, and Meyer's *Governmental Regulation of Railway Rates*. Dr. Parsons sees nothing but evil in the railroad control of railroad rates, while Professor Meyer sees nothing but evil in the governmental regulation of railroad rates. The author of the book,

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under review, writing from the standpoint of a lawyer and a railroad president, familiar with the judicial construction of the Interstate Commerce Act, clearly recognizes the public obligations of the railroads, the practical necessity of public regulation of railroad-made rates and also the inherent difficulties under our complex form of government in the exercise of such regulation as to intra-state and inter-state traffic. *"Medio tutissimus ibis."*

The book deals only with freight rates, but as the author states, "the fundamental principles governing rates and fares are the same." There is a distinction, however, pointed out by the Supreme Court in the Party Rate Case, 145 U. S. 263, in this, that a discrimination in favor of the purchaser of a number of passenger tickets at reduced fares does not operate to the prejudice of other passengers; while such a discrimination based on the quantity shipped in freight rates might put out of business all but the favored shipper whose business was large enough to ship the requisite amount.

The author's statement of the underlying principles of freight rates with analysis of the essential elements controlling the making of such rates on the basis of the value of service, that is, "charging what the traffic will bear," is clear and direct. It means charging "what the shipper can afford to pay," and is the system of making rates to develop business, always subject to the economic check that charging what the traffic will not bear cuts off business and affects the prosperity of the railroad. The practical application of this principle of value of service necessitates classification when applied to different kinds of goods, and involves local discrimination when the same service varies in value when rendered to different localities. It necessarily follows, therefore, that some discriminations are just and others unjust. Discrimination is unjust when made without any reasonable basis and as the result of favor.

This distinction between just and unjust discriminations, is not only sustained by the essential facts of the application of the value of the service principle in the making of rates and what may be called the common law of railroad rates, but is in accord with the judicial construction of the Interstate Commerce Act. Thus the Supreme Court in the Party Rate Case, referring to sections 2 and 3 of the Interstate Commerce Act, says: "It is not all discriminations or preferences that fall within the inhibition of the statutes, only such as are unjust and unreasonable. . . . Indeed the possibility of just

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discrimination and reasonable preferences is recognized by those sections in declaring what shall be deemed unjust." The author, therefore, approves of discriminations between commodities when based upon cost, risk or value, and discriminations between localities when the advantages of one place over another produce conditions, which render discriminations necessary in order to obtain traffic. Local discriminations are unjust when not justified by different circumstances or conditions. The author is emphatic in declaring that discriminations between persons cannot be defended upon any theory of rates. "They work prejudicially to the railroads; drive the small shipper out of business, and injure the whole community." The author is of opinion that the Interstate Commerce Act as amended by the Elkins act, went as far as any law could, to stop personal discriminations. It is clearly shown that the public good requires not only reasonableness, but stability in equal rates. The Interstate Commerce Act, he says, attempted the impossible in its prohibition of pooling. Competition cannot be enforced and discriminations prevented at the same time. He is emphatic in the opinion that the prohibition of pooling was most unfortunate. "Pools should have been made lawful and enforceable and then regulated." It is also pointed out that consolidations and the community of interest effected between the great railroad interests have largely made pools unnecessary. "Informal understandings have taken the place of formal agreements."

Chapter VIII contains a brief comparison of rates in the United States and in the European countries; but the author says that the conditions under which the freight service is carried on in the United States and in such countries vary so widely, that only the broadest conclusions can be drawn from such comparisons. He concludes that American rates upon long-distance tariffs and upon heavy shipments are very much less than the charges for the same service upon European railroads, while there is no material difference in the charges upon the short-distance traffic and small shipments; and charges upon parcels by European railroads are less than the charges for the same service in this country.

The last two chapters, IX and X, are devoted to a discussion of the State and Federal regulation of rates. This discussion is a valuable contribution to this mooted question, because of the author's thorough equipment therefor in his clear comprehension of the limitations of State and Federal authority, and his strong, impartial and judicial

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grasp of the complicated questions involved. He bases his discussion upon the proposition that it is difficult to assert too strongly the obligations which the railroad assumes when entering public employment.

When the book was published, the so-called Esch-Townsend Bill was pending before the Fifty-eighth Congress. Reasoning from the fundamental proposition that determining in a controversy the reasonableness of an existing rate is a judicial function, and that making the rates for the future is purely a legislative function, which could be made either directly by Congress or through a commission, and that law-made rates, whether made by Congress directly or mediately through a commission could only be set aside by the courts when found to conflict with the Fifth Amendment, that is, as confiscatory, he concluded that the Esch-Towsend Bill was unconstitutional, in that it imposed upon the commission the essentially judicial function of finding an existing rate to be unreasonable, and upon the courts the non-judicial function of reviewing the reasonableness of the commission-made rate. These provisions of the Esch-Townsend Bill as to the power of the commission are contained in the act of 1906. Under this act if, after hearing upon complaint, the commission is of the opinion that a particular rate, regulation, or practice is unjust, it may prescribe a maximum rate which the carrier shall not exceed. Under the law before this amendment, the commission was essentially a referee for the Circuit Court, and its order was of no effect until enforced by a mandate of the court. Under the act of 1906, the railroad must obey the order unless its suspension is secured by affirmative action of the courts. It is clear that the change is a radical one with reference to the vesting in the commission these fundamental powers of government. There is an as obvious anomaly in having an investigating and prosecuting body charged with any judicial determination as there would be in making the prosecuting attorney the judge in the same cause. The line of distinction, however, between legislative and judicial duties is not always clearly defined, and as the act in its present form was not considered by the author, it is out of place to discuss it here.

The author is of opinion that the reasonableness of a rate made by a commission cannot be reviewed by the courts, except on the ground that it is confiscatory, and that this contention can, as a rule, only be made concerning a schedule of rates, and that while it can theoretically be made as to an individual rate, it cannot be practically. It

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may be questioned whether this view of the judicial power is not too narrow. It is true that in the consideration of State-imposed rates under the Fourteenth Amendment, the courts have considered the effect upon the income of a company, that is, whether the company was deprived of a reasonable profit in its business. But under the Fifth Amendment, where the carrier complains of a specific maximum rate fixed by the commission, as unreasonable, would it not be held that a rate is confiscatory, which prevents the carrier from charging a reasonable compensation for a service rendered. The standard of reasonableness is not clearly defined, and it may be practically impossible to determine the actual cost of a specific service of a carrier. It is none the less true, however, that the legal right to charge a reasonable compensation for any service exists, and when the rate is questioned as to the service rendered, it is determined by the courts in the light of such evidence as can be secured. A carrier deprived of the right to charge this reasonable compensation would, therefore, be deprived by a legislature or commission of his property without due process of law. It would be as immaterial to urge that he was allowed to charge reasonable rates on other commodities, as it would be that the individual has other resources left when he is deprived of any property without due process of law.

The book is an interesting and valuable contribution to the thoughtful study of a great subject.

F. N. JUDSON.

The Heart of the Railroad Problem: The History of Railway Discriminations in the United States, the Chief Efforts at Control and the Remedies Proposed, with Hints from Other Countries. By Professor FRANK PARSONS, Ph.D. (Boston: Little, Brown and Company. 1906. Pp. 364.)

Professor Parsons' book differs radically from that of Judge Noyes, in that the author does not write from the standpoint of a lawyer or railroad president, but from that of an independent investigator who is convinced that "The Heart of the Railroad Problem" lies in the impartial treatment of shippers.

The book shows exhaustive study and the examination of a vast amount of material. The author states that in its preparation he "traveled over nine countries of Europe and over three-fourths of the United States, studying railways, meeting railroad presidents and

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managers, ministers of railways, and men of every calling in the effort to get a full understanding of the railway situation," and that the reports and decisions of commissions and courts in railroad cases in the United States have been thoroughly examined and the railroad literature of other countries extensively studied."

The author is so thoroughly convinced of the vice of discrimination and preferences, that he finds nothing but evil in any form of discrimination. To him all preferences are undue, and all discriminations unjust. The discriminations in freight rates growing out of the conflict of local interests, the complaints of rival points of production, distribution and markets, are to him as objectionable as the grossest form of personal favoritism. That there are evils in discrimination between localities in the application of the value of service principle by the railroads, goes without saying, but in the language of Commissioner Prouty, in his recent article upon the effect of the new rate bill: "It is difficult to see how such discriminations can be altogether avoided, unless our waterways are to be shut up and the benefits of geographical opportunities entirely ignored." In the intense commercial rivalry between localities, it is inevitable that there should be fruitful sources of complaint as to any adjustment of freight rates. The author, however, apparently can see no difference between such discriminations between localities and the vicious practice of personal favoritism, which he alike condemns. It is this failure to recognize the distinction between just and unjust discriminations which is enforced both by the law and judicial construction of the Interstate Commerce Act, which seriously impairs the book's discussion of this complex act.

The author condemns the Senate, saying that it is too full of men interested in the railroads, one way or another, to make it easy to pass any measure which may seriously affect the profits of the roads. The book was published before the recent amendments made by the Senate to the rate bill, which very materially broaden its scope and will increase its efficiency. The author does not hesitate to criticise also the Supreme Court and says that the court has not interpreted the Interstate Commerce Act according "to its meaning and well known intent, but in a narrow and technical way that has defeated any advantage from the real purpose of the law." Thus on p. 283, it is said, referring to the decision on the long and short haul section, that "it is an absurdity to rule that the law is valid, and then decide that the

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railroads may escape from the long haul sections by means of dissimilar circumstances created by themselves." This statement is inaccurate and misleading, as it ignores the real basis of the ruling of the court. What the court did rule was that where the lower rate in the longer haul was enforced by controlling competition, the circumstances and conditions were not "similar" within the meaning of the act.

While the book shows very extended investigation and great industry, it contains a number of *ex parte* statements and charges, reported interviews, extracts from petitions and addresses, where no means of verification are afforded, which seriously impair its value as a contribution to the serious discussion of a grave and complicated subject. A notable departure from this practice is in Chapter XIX, on the Colorado Fuel rebates by the Santa Fe Railroad, where a fair statement of both sides to the controversy is given. The book is interesting and readable, however, in its graphic description of the devious forms of rebating and personal discrimination, and in its graphic statement of the difficulties and anomalies which necessarily inhere in the application in this country of the principles of "what the traffic will bear" in the adjustment of freight rates.

The author concludes that the railroads of the United States are "unique in two respects, the efficiency of the service they render, the extent and viciousness of the discriminations which they make." The arguments for and against pooling are fairly stated. He recognizes the impolicy of prohibiting pooling and believes that it ought to be legalized, but says at the same time that this could not be relied upon to abolish discriminations and would leave the worst forms untouched. He recognizes that the increased rate-making power given to the Interstate Commerce Commission would not prevent discrimination. It is clear that it would be just as easy to cut rates made by a commission as to disregard the rates made by the railroads and published by them and thereby made obligatory under the law. His conclusion is that nothing short of the "general rate-making power" can do the work properly, and that there is no remedy for discrimination except in the dominance of public interest in the regulation of railroad rates; that is, in some form of public instead of private control. He admits that it cannot be denied that great inconvenience and some injustice might be inflicted upon the railroads by public rate revision, and that it seems to come down to

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the choice of the "least of two evils." He does not attempt to explain how complete rate-making by public authority would reconcile the conflicting claims of competing localities, and intimates that "distance" tariff under public ownership may be the only solution.

F. N. JUDSON.

The Law of Interstate Commerce and its Federal Regulation. By FREDERICK N. JUDSON. (Chicago: T. H. Flood and Company. 1905. Pp. xix, 509.)

In his preface our author tells us that "the purpose of this book is to present in a compact form the law of interstate commerce as declared by the courts since the adoption of the Constitution, and also as enacted by Congress and applied by the Interstate Commerce Commission in the direct exercise of the power of Federal regulation." An examination of the book, however, discloses at once that the main purpose of the book is to discuss the Federal regulations of interstate commerce and only briefly and incidentally the "law of interstate commerce as declared by the courts since the adoption of the Constitution." That this must be so appears from the fact that only the first forty eight pages deal with the constitutional as distinguished from the statutory law on the subject, the remainder of the five hundred and more pages being devoted to: (1) a general discussion, historical and critical, of Federal regulation (about one hundred pages); (2) the text of Federal statutes regulating interstate commerce, with annotations (about two hundred and fifty pages); and (3) procedure before the Interstate Commerce Commission, forms for the same, and tables of cases. As the matter stands, any one who appeals to this work for an adequate discussion of the constitutional law of the subject will be disappointed. So far as they go, the forty-eight pages are good enough, but they are hopelessly inadequate to bear the burden thus thrust upon them.

However, the foregoing is, after all, a criticism rather of the title and preface than of the book itself. If we regard it as intended to set forth the Federal statutory regulations upon the subject, with annotations showing the judicial construction of the statutes and the decisions of the Interstate Commerce Commission made in the course of their application, the book is decidedly not without merits. Examining the book from this point of view, we find that in arranging

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his material the author has the simple plan of printing each section of the statute in question, and following it with annotations and discussions. The result, of course, is to produce not a connected and orderly discussion of the law of Federal regulation as it now exists, but rather a reference manual to which the lawyer who is getting up a case can refer when he wishes to determine the meaning of any particular section. Thus it is that the general student of the railway problem—be he lawyer, economist or political scientist—will not find here what he is seeking if he wishes a systematic exposition of the Federal law governing interstate commerce as it existed when this book was printed. Details upon any particular part of the law he can get, but not a general view of the law as a whole—to use an old saying, be cannot see the forest because of the trees. This is said neither by way of praise nor of blame, but simply that the prospective user of the book may be warned beforehand of what he will not find as well as of what he will find.

It is to be regretted that the proofreading seems to have been not very carefully done, and that at times the style of the author shows traces of haste or carelessness in the preparation of the book.

WALTER WHEELER COOK.

The Old Colonial System. By G. B. HERTZ, M.A., B.C.L. (Publication of the University of Manchester, Historical Series, No. III. Manchester. At the University Press. 1905. Pp. xi, 232.)

It is a fair test of a book to inquire if it has fulfilled its purpose; and the first step of a reviewer must be to ascertain the scheme or plan which the author has in mind. Applying this principle to the essay before us we learn that the writer, impressed by the general prevalence of a complete misunderstanding of the old colonial system, wishes to treat the subject in a more impartial manner, and to redeem it from the traditional Whiggism which, in England, still permeates most popular histories. The book is intended "to weigh the causes, character and results of Great Britain's old colonial system," to "examine the popular conception of the uses of empire during those portions of the reigns of George II. and George III., when that system reached its zenith." This is a large undertaking, and Mr. Hertz fortunately still further qualifies his intentions by suggesting that it is public

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opinion, rather than details of legislation or of campaigns, which shall constitute the chief matter of his work. We call this a fortunate qualification, for it is the narrower task that the book really performs. It is not a history of the old colonial system, for it treats extensively neither the political events of its upbuilding nor the regulations which constituted the commercial code. There is, indeed, a sketch of the Navigation laws, the Enumeration laws, and the laws limiting colonial manufacture; but some important parts of the code are not mentioned, for example, the provisions which compelled many commodities imported into the colonies from Europe to pass through England as entrepôt. It is confusing to include molasses among the articles which the colonists were forbidden to manufacture, for the law of 1733, as Mr. Hertz elsewhere shows, was of another class. Still more remarkable is the following sentence: "The colonial charters were nearly all drafted by Americans, and indeed apart from industrial matters, Great Britain gave her colonies absolute self-government, and tolerated slavery as necessary to the welfare of the South long after it was considered unlawful here, and was an abomination to the middle and northern colonies."

As will be remarked again below, Mr. Hertz has made excellent use of pamphlets and other contemporary literature. There is, however, almost a total lack of reference to the treasures of the Record Office—the colonial despatches and the proceedings of the Board of Trade. Indeed the mechanism of the colonial system is barely mentioned. Nor do we find any sufficient account of the interaction of the laws intended to regulate the industrial activities of the colonies, with the customs laws of the kingdom, an interaction which, in the case of tobacco, for example, was highly important. Furthermore, with reference to the merely theoretical side of the system, it seems to us that a complete narrative must surely go back to origins. William Pitts' war ministry of 1756 makes, indeed, a far more dramatic starting-point, but the public opinion which at that day existed as to colonies and dependencies, had been formed during the first half of the century. Walpole's *régime* has been too much neglected; for in the mercantile system, peace had her victories no less renowned than war.

We have said quite enough, however, about the shortcomings of the volume, and perhaps the chief criticism is that the title covers more than the book. Mr. Hertz has given us a very valuable and thor-

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ough critique of the expressions of partisan feeling as to the colonies in the years prior to and including the American Revolution. As we have already suggested, the author has delved industriously into the contemporary literature of political and economic tracts, memoirs, travels, correspondence, etc. Out of these materials he has woven a skilful reproduction of the sentiments of individuals, such as Chatham and Burke, of English and colonial parties, and of the nation as it followed one phase of theory or another. The criticism of the elder Pitt is noteworthy, though there is no reference, we remark, to Mr. Hubert Hall's interesting paper on Chatham's colonial policy. Of Pitt's constructive statesmanship in colonial matters, Mr. Hertz is very doubtful; he had the old ideas as to colonies, and as he became more involved in continental affairs he, relatively speaking, lost interest in the colonial part of the empire. Mr. Hertz's statement that in Chatham's speeches and correspondence there are no traces of an attempt to create a form of colonial policy which might perpetuate the fabric, seems to us a little too emphatic, in view of Chatham's speech of February 1, 1775. With his general conclusions, we may agree—that Pitt lacked the power to educate his people. Instead, his war expenses increased the burden of the empire, and led to American taxation. Lastly, his brilliant militarism diverted men's minds, from the reformation of constitutional abuses. The superiority of Burke's position over that of Chatham is emphasized, but Burke had no more power than the former to stay the downfall of the British empire in America. His chief limitation was his inability to grasp modern thought; "no glimmer of the dawning faith in democracy emancipated his mind from the general British devotion to the established order of things in Church and State." In the light of the failure of such men, it is easy for Mr. Hertz to lift from the shoulders of the King the personal responsibility for the war, which so often has been laid upon him.

Mr. Hertz discusses sympathetically the side of the American loyalists. He draws attention to the plans for imperial organization elaborated by Galloway, Seabury and Pownall. Compared with these, the feat of Hamilton and Washington—the binding together of the United States—"was less perfect in conception than an Anglo-Saxon federation, but was, in the light of that age, the only feasible compromise of the warfare between the larger and smaller political units."

While the discussion of the colonial system itself is of course carried

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throughout the whole work, one chapter is devoted to a special consideration of its leading characteristics. Mr. Hertz makes it clear that the British policy was a continuous one, and that there was no real difference between the principles of 1765 and those of 1756. The chapter contains summaries of the several classes of laws—those which limited the trade of the colonies, the Navigation acts, and the prohibtions of colonial manufacture. The system of bounties, and the questions of immigration and the slave trade are well handled. As to the author's judgment of the system as a whole, the expressions of the preface led us to expect an apology, but, as the book progresses it seems to us that Mr. Hertz has reversed the part of Balaam the son of Beor, and ended by a thorough disclosure of its fallacies and its weaknesses. Though "based upon the very sensible ideal of a self-supporting empire, the old colonial system was prompted by a curious compound of great ideals and petty prejudices! In the War of Independence, it "proved no rallying point for the nation. One of its worst faults was a complete want of that idealism which alone can unite a whole people in the hour of need, and before which party jealousies roll away like mists before sunshine. It failed wholly to inspire a national conviction that justice was on the side of the British arms." Finally, "upon such grounds. . . . as have been here set forth, we are obliged to condemn the old colonial system as a working policy."

In the last three chapters, Mr. Hertz discusses briefly the loss of interest in colonization, which, *post mortem*, followed the peace of 1783 and continued into the nineteenth century. In his closing paragraphs, he takes up the lessons of the Revolution, asserting, however, his intention not to mix history with present politics. Two principles "stand beyond the sphere of partisanship." First, to support imperialism, or rather imperial unity, there must be some common material advantage; "man will not live politically on the principle of nationality alone." Secondly, the idea of a blood-tie, even if delusive historically, is "the most powerful political fiction in the world." These principles are admitted by both parties to the current fiscal dispute, and, "so long as Parliament and Press are not drowned by parochialism, the British people will not drop back into Mid-Victorian indifference." We fear that some good conservative might say that Mr. Hertz, "'swearing he would ne'er consent, consented."

For the work, in its special field, we have hearty commendation.

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Some years ago there was a tendency to reduce to a vanishing point the evils of the old colonial system. Today, investigation in American sources gives more and more support to the conclusions which Mr. Hertz bases on his study of other materials. Our extensive quotations suffice to show that the book is interesting and in general very well written. The use of the term "direct," as applied to the English taxation of America is at least open to question. One or two misprints may be noted. On p. 78, in the last line, "us" should be "as," while on p. 211, a more disastrous slip substitutes "independence" for "dependence." These are small errors in an otherwise attractive volume.

ST. GEORGE LEAKIN SIOUSSAT.

PERIODICAL ARTICLES IN POLITICAL SCIENCE.[1]

Only the technical legal and political science journals are here indexed. All references are to the year 1906.

Algeciras Conference and the Present Situation of France in Morocco. *Henri Louis.* Rev. Gén. de Droit Int. Pub. May-June.

Aliens, A Question of International Law in the Deportation of. *C. N. Gregory.* Jurid. Rev. July.

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Alsace-Loraine. *B. E. Howard.* Pol. Sci. Quar. Sept.

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Anglo-French Arbitration in the Muscat Affair. *M. Bressonet.* Rev. Gén. de Droit Int. Pub. March-April.

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Belgian Elections, The Next. *M. Muret.* Ques. Dipl. et Col. April.

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Capitulations in Egypt, The Projects of Reform of, and the Régime of, according to the Reports of Lord Cromer. *G. Gidel.* Rev. Gén. de Droit Int. Pub. July-Aug.

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Constitutional Convention of the United States, The Next. *W. Clark.* Alb. L. Jr. May.

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English Elections of January, 1906, The General Results. *E. de Norimont.* Questions Dipl. et Col. March 1.

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Germany and England, The Economic Rivalry of. *Jacques Bardoux.* Ques. Dipl. et Col. March 16.

Germany, The Colonial Mortifications of. *M. Muret.* Ques. Dipl. et Col. July 16.

Germany in Asia Minor. *J. I. de la Tom.* An. des Sci. Pol. July.

German Workmen, Legal Position of. *W. H. Dawson.* Pol. Sci. Quar. June.

Government of Law as Distinguished from a Government of Functionaries. *A. H. Taylor.* Green Bag. Sept.

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Jury Trial and the Federal Constitution. *W. C. Dennis.* Col. L. Rev. June.

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